

8-16-2011

Employers Mut. Cas. Co. v. Donnelly Clerk's Record v. 1 Dckt. 38623

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Vol. 1 of 3

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS MUTUAL CASUALTY COMPANY,
an Iowa Corporation

Appellant/Plaintiff,

vs. **LAW CLERK**

RIMAR CONSTRUCTION, INC., Idaho Corporation; and
DAVID and KATHY DONNELLY, husband and wife

Respondents/Defendants

Appealed from the District Court of the First Judicial
District of the State of Idaho in and for Bonner County

HONORABLE STEVE VERBY
District Judge

JAMES G. REID
Attorney for Appellants

ALLEN B. ELLIS
Attorney for Respondents

VOLUME 1

38623

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)	
COMPANY, an Iowa Corporation)	
)	SUPREME COURT NO 38623-2011
Appellant/Plaintiff,)	
)	CLERK'S RECORD ON APPEAL
vs.)	
)	Bonner County Case # CV-2007-0885
RIMAR CONSTRUCTION, INC.,)	
an Idaho Corporation; and DAVID)	
and KATHY DONNELLY, husband and)	
wife)	
Respondents/Defendants)	
_____)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for
the County of Bonner.

HONORABLE STEVE VERBY
District Judge

JAMES G. REID
RINGERT LAW CHARTERED
455 S. THIRD ST., P.O. BOX 2773
BOISE, ID 83701-2773
ATTORNEY FOR APPELLANT

ALLEN B. ELLIS
ELLIS, BROWN, & SHEILS, CHARTERED
707 N. 8TH ST., P.O. BOX 388
BOISE, ID 83701-0388
ATTORNEY FOR RESPONDENTS

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Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
5/24/2007	NEWC	MORELAND	New Case Filed Steve Verby
	APER	MORELAND	Plaintiff: Employers Mutual Casualty Company Appearance James G Reid Esq Steve Verby
		MORELAND	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Ringert Clark Chartered Receipt number: 0373652 Dated: 5/30/2007 Amount: \$88.00 (Check) For: [NONE] Steve Verby
	PETN	MORELAND	Petition for Declaratory Judgment Steve Verby
5/30/2007	SMIS	MORELAND	Summons Issued - Kavid & Kathy Donnelly Steve Verby
	SMIS	MORELAND	Summons Issued - Rimar Construction, Inc. Steve Verby
6/29/2007		PHILLIPS	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Featherston Law Firm Receipt number: 0375822 Dated: 6/29/2007 Amount: \$58.00 (Check) For: [NONE] Steve Verby
	NOAP	JACKSON	Notice Of Appearance - Brent Featherston for Rimar Construction Steve Verby
	APER	JACKSON	Defendant: Rimar Construction Inc Appearance Brent Featherston Steve Verby
7/11/2007	SMRT	MORELAND	Summons Returned - David & Kathy Donnelly Steve Verby
	AFSV	MORELAND	Affidavit Of Service - David Donnelly Served & Subserved for Kathy 6/27/07 Steve Verby
	SMRT	MORELAND	Summons Returned - Rimar Construction, Inc. Steve Verby
	AFSV	MORELAND	Affidavit Of Service - Ivan M Rimar, Registered Agent Served for Rimar Construction 6/27/07 Steve Verby
7/18/2007		PHILLIPS	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Lukins & Annis PS Receipt number: 0376899 Dated: 7/18/2007 Amount: \$58.00 (Check) For: [NONE] Steve Verby
	ANSW	MORELAND	Answer - David & Kathy Donnelly Steve Verby
	APER	MORELAND	Defendant: Donnelly, David Appearance Michael G. Schmidt Steve Verby
	APER	MORELAND	Defendant: Donnelly, Kathy Appearance Michael G. Schmidt Steve Verby
26/2007	NSSC	MORELAND	Notice Of Substitution Of Counsel Steve Verby
	APER	MORELAND	Defendant: Rimar Construction Inc Appearance Stephen D Phillabaum Steve Verby
1/2007	NOTC	MORELAND	Notice of Intent to Take Default Steve Verby
		BRACKETT	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: Phillabaum, Stephen D (attorney for Rimar Construction Inc) Receipt number: 0377771 Dated: 8/1/2007 Amount: \$14.00 (Credit card) For: [NONE] Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
8/1/2007		BRACKETT	Filing: Technology Cost - CC Paid by: Steve Verby Phillabaum, Stephen D (attorney for Rimar Construction Inc) Receipt number: 0377771 Dated: 8/1/2007 Amount: \$3.00 (Credit card) For: [NONE]
	ANSW	MORELAND	Rimar Construction Inc.'s Answer to Plf's Petition for Declaratory Judgment, Counterclaim, & Request for Jury Trial Steve Verby
8/14/2007	NOSV	MORELAND	Notice Of Service - Plf's First Set of Discovery Requests Upon Def Rimar Construction, Inc. Steve Verby
	NOSV	MORELAND	Notice Of Service - Plf's First Set of Discovery Requests Upon Defendants David & Kathy Donnelly Steve Verby
8/17/2007	MOTN	MORELAND	Motion to Dismiss Defendant Rimar Construction's Counterclaim Steve Verby
	MEMO	MORELAND	Memorandum in Support of Motion to Dismiss Defendant Rimar Construction's Counterclaim Steve Verby
	NOHG	MORELAND	Notice Of Hearing Re: Motion to Dismiss Defendant Rimar Construction's Counterclaim Steve Verby
3/20/2007	HRSC	MORELAND	Hearing Scheduled (Motion to Dismiss 09/19/2007 03:30 PM) Defs Counterclaim Steve Verby
3/30/2007	SCHE	MORELAND	Scheduling Order Steve Verby
	NOTD	MORELAND	Notice Of Taking Deposition of Kathy Donnelly 10/30/07 9:30 Steve Verby
	NOTD	MORELAND	Notice Of Taking Deposition of David Donnelly 10/29/07 9:30 Steve Verby
1/4/2007	MEMO	MORELAND	Defendant/Counterclaimant Rimar Construction, Inc.'s Memorandum in Opposition to Dismiss Counterclaim Steve Verby
	MOTN	MORELAND	Motion to Stay Proceedings/Notice of Hearing Steve Verby
	HRSC	MORELAND	Hearing Scheduled (Motion 09/19/2007 03:30 PM) to Stay Proceedings Steve Verby
	MEMO	MORELAND	Memorandum in Support of Motion to Stay Proceedings Steve Verby
6/2007	SCHF	OPPELT	Scheduling Form- Michael Schmidt Steve Verby
7/2007	NOSV	MORELAND	Notice Of Service - Defs' Answers to Plf's First set of Discovery Requests Steve Verby
	NOSV	MORELAND	Notice Of Service - Defs' First Set of Interro., & Requests for Production of Documents Steve Verby
10/2007	SCHF	OPPELT	Scheduling Form- Stephen Phillabaum Steve Verby
12/2007	MEMO	MORELAND	Memorandum in Opposition to Motion to Stay Proceedings Steve Verby
13/2007	SCHF	OPPELT	Scheduling Form- David Claiborne Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
9/14/2007	MEMO	MORELAND	Defendant Rimar Construction, Inc.'s Memorandum Joining with Defendant Donnellys' Motion to Stay Proceedings & Responding to Plaintiff's Memorandum in Opposition to Stay Proceedings
9/17/2007	MEMO	MORELAND	Reply Memorandum in Support of Motion to Dismiss Defendant Rimar Construction's Counterclaim
	NOTD	MORELAND	Amended Notice Of Taking Deposition of Kathy Donnelly 11/30/07 9:30
	NOTD	MORELAND	Amended Notice Of Taking Deposition of David Donnelly 11/29/07 9:30
9/25/2007	CONT	CMOORE	Continued (Motion 12/05/2007 11:00 AM) to Stay Proceedings
	CONT	CMOORE	Continued (Motion to Dismiss 12/05/2007 11:00 AM) Defendant's Counterclaim
		CMOORE	Amended Notice Of Hearing
9/26/2007	NOTL	MORELAND	Notice Of Trial/PreTrial Order
	HRSC	MORELAND	Hearing Scheduled (Jury Trial - 5 Days 06/23/2008 09:00 AM)
10/4/2007	NOSV	MORELAND	Notice Of Service - Answers to First Interro., & Responses to Requests for Production
	NOSV	MORELAND	Notice Of Service
0/18/2007	NOSV	MORELAND	Notice Of Service - Supplemental Answers to First Interro., & Responses to Requests for Production upon Rimar Const.
0/22/2007	STIP	MORELAND	Stipulation for Leave to Amend Petition for Declaratory Judgment
	MISC	MORELAND	*****START FILE 2*****
0/24/2007	MOTN	MORELAND	Motion to Appear as counsel Pro Hac Vice & Declaration of Brian S. Sheldon in Support Thereof
0/29/2007	NOTD	MORELAND	Notice of Deposition of David Donnelly - 12/21/07 9:30
	NOTD	MORELAND	Notice of Deposition of Kathy Donnelly - 12/20/07 9:30
1/31/2007	ORDR	MORELAND	Order Granting Admission Pro Hac Vice
	ORDR	MORELAND	Order for Leave to Amend Petition for Declaratory Judgment
	CERT	MORELAND	Certificate Of Mailing
1/7/2007	NOHG	MORELAND	Notice Of Hearing Re: Defendants' Motion for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment
	MOTN	MORELAND	Defendants' Motion for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User		Judge
11/7/2007	MEMO	MORELAND	Memorandum in Support of Defendants' Motion for Dismissal of Plaintiff's Amended Petition	Steve Verby
	AFFD	MORELAND	Affidavit of Peter J. Johnson in Support of Defendant's Motion to Dismiss Plaintiff's Amended Petition	Steve Verby
	PETN	MORELAND	Amended Petition for Declaratory Judgment	Steve Verby
11/8/2007	HRSC	MORELAND	Hearing Scheduled (Motion 12/05/2007 11:00 AM) for Dismissal of Plf's Amended Petn for Declaratory Jdmt	Steve Verby
11/9/2007	MEMO	MORELAND	Supplemental Memorandum in Support of Motion to Stay Proceedings	Steve Verby
11/23/2007	NOSV	MORELAND	Notice Of Service - Second Supplemental Response to RCI's Requests for Production	Steve Verby
11/28/2007	MEMO	MORELAND	Memorandum in Opposition to Rimar's Motion to Dismiss Amended Petition	Steve Verby
	MEMO	MORELAND	Supplemental Memorandum in Opposition to Motion to Stay Proceedings	Steve Verby
	MOTN	MORELAND	Motion to Strike Affidavit of Peter J. Johnson & Notice of Hearing	Steve Verby
11/29/2007	HRSC	MORELAND	Hearing Scheduled (Motion 12/05/2007 11:00 AM) to Strike	Steve Verby
11/30/2007	MISC	OPPELT	Rimar Construction's Reply Memorandum in Support of Motion to Dismiss Amended Petition	Steve Verby
	MISC	OPPELT	Defendant's Rimar Construction, Inc.'s Response Memorandum in Opposition to Motion to Strike Affidavit of Peter J. Johnson	Steve Verby
	AFFD	OPPELT	Supplemental Affidavit of Peter J. Hohnson in Support of Defendant's Motion for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment	Steve Verby
2/5/2007	WDRW	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Withdrawn to Strike	Steve Verby
	HRHD	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Hearing Held to Stay Proceedings	Steve Verby
	CTLG	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Court Log- #07-72 to Stay Proceedings	Steve Verby
	GRNT	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Motion Granted to Stay Proceedings	Steve Verby
	HRHD	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Hearing Held for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment	Steve Verby
	CTLG	MORELAND	Hearing result for Motion held on 12/05/2007 11:00 AM: Court Log- for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment	Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
12/5/2007	HRHD	MORELAND	Hearing result for Motion to Dismiss held on 12/05/2007 11:00 AM: Hearing Held Defendant's Counterclaim - Not being Ruled on at this time
	CTLG	MORELAND	Hearing result for Motion to Dismiss held on 12/05/2007 11:00 AM: Court Log- #07-72 Defendant's Counterclaim - Not being Ruled on at this time
12/12/2007	ORDR	MORELAND	Order Staying Plaintiff's Declaratory Action - This Order shall expire upon conclusion of the underlying action CV-06-0445
	HRVC	MORELAND	Hearing result for Jury Trial - 5 Days held on 06/23/2008 09:00 AM: Hearing Vacated
	STAT	OPPELT	STATUS CHANGED: inactive
12/13/2007	NOTC	MORELAND	Notice Vacating Deposition of Kathy Donnelly
	NOTC	MORELAND	Notice Vacating Deposition of David Donnelly
3/28/2008		BOWERS	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Donnelly Receipt number: 0390835 Dated: 3/28/2008 Amount: \$12.00 (Cash)
12/19/2008	MISC	PHILLIPS	leave open as long as related case continues
3/6/2009	MOTN	OPPELT	Motion to Vacate Order Staying Plaintiff's Declaratory Action
3/12/2009	NOFH	OPPELT	Notice Of Hearing
	HRSC	OPPELT	Hearing Scheduled (Motion 04/08/2009 10:30 AM) to Vacate Order Staying Plaintiff's Declaratory Action (Telephonic)
	LETT	OPPELT	Letter from James Reid to Counsel
	NOFH	OPPELT	Notice Of Hearing
1/1/2009	RSPN	PHILLIPS	Defendant Rimar Construction, Inc's Response to Plaintiff's Motion to Vacate Order Staying Plaintiff's Declaratory Action
	MEMO	PHILLIPS	Rimar Construction's Reply Memorandum in Support of Motion to Dismiss Amended Petition
	MEMO	PHILLIPS	Memorandum in Support of Defendants' Motion for Dismissal of Plaintiff's Amended Petition
8/2009	CTLG	PHILLIPS	Hearing result for Motion held on 04/08/2009 10:30 AM: Court Log- 09-84 to Vacate Order Staying Plaintiff's Declaratory Action (Telephonic)
	DCHH	PHILLIPS	Hearing result for Motion held on 04/08/2009 10:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: none given to Vacate Order Staying Plaintiff's Declaratory Action (Telephonic)

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
4/8/2009	DENY	PHILLIPS	Hearing result for Motion held on 04/08/2009 10:30 AM: Motion Denied to Vacate Order Staying Plaintiff's Declaratory Action (Telephonic)
5/22/2009	MOTN	OPPELT	Second Motion to Vacate Order Staying Plaintiff's Declaratory Action
	MEMO	OPPELT	Memorandum in Support of Second Motion to Vacate Order Staying Plaintiff's Declaratory Action
6/5/2009	NOFH	OPPELT	Notice Of Hearing
	HRSC	OPPELT	Hearing Scheduled (Motion 07/09/2009 09:30 AM) to Vacate Order Staying Plaintiff's Declaratory Action (James Reid Telephonic)
6/29/2009	OBJC	OPPELT	Objection to EMC's Motion to Lift Stay
7/7/2009	NOTC	OPPELT	Notice of Withdrawal of Objection to EMC's Motion to Lift Stay
	REPL	PHILLIPS	Reply Memorandum in Support of Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Action
	MISC	PHILLIPS	Non-Opposition to Vacating Stay and Stipulation to Allow Filing of Amended Answer and Counterclaim
	STAT	PHILLIPS	STATUS CHANGED: closed pending clerk action
7/9/2009	CTLG	PHILLIPS	Hearing result for Motion held on 07/09/2009 09:30 AM: Court Log- 09-172 to Vacate Order Staying Plaintiff's Declaratory Action (James Reid by telephone)
	DCHH	PHILLIPS	Hearing result for Motion held on 07/09/2009 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: none given to Vacate Order Staying Plaintiff's Declaratory Action (James Reid by telephone)
	GRNT	PHILLIPS	Motion Granted - Vacating Stay of Plaintiff's Declaratory Action
7/10/2009	ANSW	PHILLIPS	Rimar Construction's Amended Answer to Plaintiff's Amended Petition for Declaratory Judgment and Counterclaim
7/13/2009		PHILLIPS	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Kathy Donnelly Receipt number: 0418604 Dated: 7/13/2009 Amount: \$18.00 (Cash)
7/15/2009	REPL	PHILLIPS	Reply to Counterclaim
7/17/2009	ORDR	PHILLIPS	Order Vacating Stay of Plaintiff's Declaratory Action
7/24/2009	MOTN	PHILLIPS	Motion to Withdraw as Counsel to David Donnelly and Kathy Donnelly; Notice of Hearing; Affidavit

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
7/24/2009	HRSC	PHILLIPS	Hearing Scheduled (Motion to Withdraw 09/09/2009 11:00 AM) Hyslop's Motion
8/5/2009	CESV	OPPELT	Amended Certificate Of Service
8/10/2009	NOTC	OPPELT	Notice of Non-Opposition Re: Motion to Withdraw as Counsel to David Donnelly and Kathy Donnelly
8/14/2009	NOTC	OPPELT	Notice of Non-Opposition Re: Motion to Withdraw as Counsel to David Donnelly and Kathy Donnelly
9/4/2009	NOWD	OPPELT	Notice Of Withdrawal and Substitution of Counsel
	APER	OPPELT	Defendant: Donnelly, David Appearance Marc A. Lyons
	APER	OPPELT	Defendant: Donnelly, Kathy Appearance Marc A. Lyons
9/8/2009	HRVC	CMOORE	Hearing result for Motion to Withdraw held on 09/09/2009 11:00 AM: Hearing Vacated per Judge Verby (substitution of counsel has been filed)
11/12/2009	MOSJ	PHILLIPS	Plaintiff's Motion For Summary Judgment
	MEMO	PHILLIPS	Memorandum in Support of Plaintiff's Motion for Summary Judgment
	STMT	PHILLIPS	Statement of Facts Re: Plaintiff's Motion for Summary Judgment
	AFFD	PHILLIPS	Affidavit of James G Reid
	NOFH	PHILLIPS	Notice Of Hearing Re: Plaintiff's Motion for Summary Judgment - Jan 20, 2010
	HRSC	PHILLIPS	Hearing Scheduled (Motion for Summary Judgment 01/20/2010 03:30 PM) Plaintiff's Motion
1/25/2009	AFFD	OPPELT	Affidavit of Michael A. Ealy in Support of Motion to Amend Answer and Counterclaim
	MEMO	OPPELT	Memorandum in Support of Motion to Amend Answer
	MOTN	OPPELT	Motion to Amend Answer
	NOFH	OPPELT	Notice Of Hearing
	HRSC	OPPELT	Hearing Scheduled (Motion 12/23/2009 09:00 AM) to Amend Answer and Counterclaim
1/3/2009	NOTC	OPPELT	Notice of No Contest
1/9/2009	NOTC	OPPELT	Notice of Non-Opposition Re: Motion to Amend Answer and Counterclaim
1/15/2009	NOTC	OPPELT	Notice of Non-Opposition Re: Motion to Amend Answer and Counterclaim
1/18/2009	ORDR	PHILLIPS	Order Granting Defendants Donnelly's Motion to Amend Answer
	LETT	PHILLIPS	Letter from Ealy
1/21/2009	MOSJ	PHILLIPS	Motion For Summary Judgment

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
12/21/2009	MEMO	PHILLIPS	Memorandum in Support of Motion for Summary Judgment
	AFFD	PHILLIPS	Affidavit of Michael Ealy in Support of Motion for Summary Judgment
	NOFH	PHILLIPS	Notice Of Hearing - Jan 20, 2010
	HRSC	PHILLIPS	Hearing Scheduled (Motion for Summary Judgment 01/20/2010 03:30 PM) Defendant's Motion
12/22/2009	HRVC	CMOORE	Hearing result for Motion to Amend Answer and Counterclaim held on 12/23/2009 09:00 AM: Hearing Vacated - Order to Amend signed 12/18/09
12/23/2009	ANSW	OPPELT	Amended Answer and Counterclaim
1/5/2010	CMIN	RASOR	Court Minutes Hearing type: Motion Hearing date: 1/5/2011 Time: 9:30 am Courtroom: Court reporter: Minutes Clerk: Sandra Rasor Tape Number: city hall
1/7/2010	MEMO	OPPELT	Memorandum in Opposition to Defendant Donnelly's Motion for Summary Judgment
1/14/2010	MEMO	CMOORE	Memorandum in Reply to Plaintiff's Memorandum in Opposition
1/20/2010	CMIN	SECK	Court Minutes Hearing type: Motion for Summary Judgment Hearing date: 1/20/2010 Time: 3:31 pm Courtroom: Court reporter: Minutes Clerk: Melissa Seck Tape Number: 10-04
	CTLG	OPPELT	Court Log- CD# 10-04
	DCHH	OPPELT	Hearing result for Motion for Summary Judgment - Defendant's Motion held on 01/20/2010 03:30 PM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: Less Than 100 Pages
	DCHH	OPPELT	Hearing result for Motion for Summary Judgment - Plaintiff's Motion held on 01/20/2010 03:30 PM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: Less Than 100 Pages
2/1/2010	REPL	PHILLIPS	Reply to Counterclaim
2/7/2010	ORDR	CMOORE	Order Denying Cross-Motions for Summary Judgment (8 pages)

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User		Judge
4/19/2010	MOTN	OPPELT	Motion for Permissive Appeal	Steve Verby
	MEMO	OPPELT	Memorandum in Support of Motion for Permissive Appeal	Steve Verby
	NOFH	OPPELT	Notice Of Hearing	Steve Verby
	HRSC	OPPELT	Hearing Scheduled (Motion 06/09/2010 10:00 AM) for Permissive Appeal	Steve Verby
4/20/2010	MOTN	OPPELT	Amended Motion for Permissive Appeal	Steve Verby
5/6/2010	NOTC	OPPELT	Notice of Vacating Hearing and Withdrawal of Motion for Permissive Appeal	Steve Verby
	HRVC	OPPELT	Hearing result for Motion held on 06/09/2010 10:00 AM: Hearing Vacated for Permissive Appeal	Steve Verby
5/18/2010	HRSC	CMOORE	Hearing Scheduled (Status Conference 06/23/2010 09:15 AM) Re: Trial Setting (Telephonic)	Steve Verby
		CMOORE	Notice of Hearing	Steve Verby
3/7/2010		BOWERS	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Donnelly, Kathy Receipt number: 0437552 Dated: 6/7/2010 Amount: \$48.00 (Cash)	Steve Verby
		BOWERS	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Donnelly, Kathy Receipt number: 0437552 Dated: 6/7/2010 Amount: \$1.00 (Cash)	Steve Verby
7/21/2010	MOTN	HENDRICKSO	Motion to Amend Answer and Counterclaim	Steve Verby
	MEMO	HENDRICKSO	Memorandum in Support of Motion to Amend Anser and Counterclaim	Steve Verby
	AFFD	HENDRICKSO	Affidavit of Michael A. Ealy in Support of Motion To Amend Anser and Counterclaim (with proposed Second Amended Answer, Counterclaim and Crossclaim attached)	Steve Verby
	NOHG	HENDRICKSO	Notice Of Hearing	Steve Verby
	HRSC	HENDRICKSO	Hearing Scheduled (Motion 07/07/2010 09:30 AM) Motn to Amend Answer and Counterclaim	Steve Verby
7/23/2010	CMIN	SECK	Court Minutes Hearing type: Status Conference Hearing date: 6/23/2010 Time: 9:18 am Courtroom: Court reporter: Minutes Clerk: Melissa Seck Tape Number: crtrm 1 James Reid Mike Eli	Charles Hosack
			CTLG	PHILLIPS

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
5/23/2010	DCHH	PHILLIPS	Hearing result for Status Conference held on 06/23/2010 09:15 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 Re: Trial Setting (Telephonic)
	CONT	PHILLIPS	Hearing result for Status Conference held on 06/23/2010 09:15 AM: Continued (to July 7 per Judge Hosack) Re: Trial Setting (Telephonic)
	HRSC	PHILLIPS	Hearing Scheduled (Status Conference 07/07/2010 09:30 AM) re trial setting Continued from June 23, 2010
	MISC	PHILLIPS	*****BEGIN FILE NO. 5*****
	NOFH	PHILLIPS	Amended Notice Of Telephonic Hearing
6/24/2010		PHILLIPS	Notice Of Hearing
7/6/2010	MEMO	PHILLIPS	Memorandum in Opposition to Defendant Donnellys' Motion to Amend Answer and Counterclaim
7/7/2010	CMIN	RASOR	Court Minutes Hearing type: Motion Hearing date: 7/7/2010 Time: 9:38 am Courtroom: Court reporter: Val Larson Minutes Clerk: Sandra Rasor Tape Number: 1
	CTLG	PHILLIPS	Hearing result for Status Conference held on 07/07/2010 09:30 AM: Court Log- Crtrm 1 re trial setting (Continued from June 23, 2010)
	DCHH	PHILLIPS	Hearing result for Status Conference held on 07/07/2010 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 re trial setting (Continued from June 23, 2010)
	CTLG	PHILLIPS	Hearing result for Motion held on 07/07/2010 09:30 AM: Court Log- Crtrm 1 Motion to Amend Answer and Counterclaim - Donnellys by telephone

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
7/7/2010	DCHH	PHILLIPS	Hearing result for Motion held on 07/07/2010 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 Motion to Amend Answer and Counterclaim - Donnellys by telephone
	GRNT	PHILLIPS	Hearing result for Motion held on 07/07/2010 09:30 AM: Motion Granted Motion to Amend Answer and Counterclaim - Donnellys by telephone
	HRSC	PHILLIPS	Hearing Scheduled (Motion 07/21/2010 11:00 AM) for Reconsideration
7/8/2010	MOTN	CMOORE	Motion for Extension of Time and Continuance of Hearing
	MEMO	CMOORE	Verified Memorandum in Support of Motion for Extension of Time and Continuance of Hearing
	MOTN	CMOORE	Motion to Shorten Time
	MOTN	PHILLIPS	Defendant Donnelly's Motion for Reconsideration of Order on Motions for Summary Judgment
	MEMO	PHILLIPS	Defendant Donnelly's Memorandum in Support of Motion for Reconsideration
	NOFH	PHILLIPS	Notice Of Hearing - July 21, 2010
7/9/2010	HRSC	PHILLIPS	Hearing Scheduled (Court Trial - 4 Days 04/25/2011 09:00 AM)
	NOFH	PHILLIPS	Notice Of Hearing
7/13/2010	ANSW	OPPELT	Second Amended Answer, Counterclaim and Cross Claim
7/15/2010	OBJC	OPPELT	Defendant's Objection to Plaintiff's Motion for Extension of Time and Continuance of Hearing
	ORDR	OPPELT	Order Granting Defendant Donnelly's Motion to Amend Answer and Counterclaim
7/16/2010	ORDR	OPPELT	Order on Motion to Continue
	CONT	OPPELT	Hearing result for Motion held on 07/21/2010 11:00 AM: Continued for Reconsideration
	HRSC	OPPELT	Hearing Scheduled (Motion 09/08/2010 10:00 AM) for Reconsideration
7/26/2010	REPL	PHILLIPS	Plaintiff's Reply to Second Amended Answer, Counterclaim and Crossclaim
7/28/2010	NOTC	PHILLIPS	Notice of Withdrawal of Plaintiff's first Set of discovery Reuqwt Upon Defendants David and Kathy Donnelly
	NOSV	PHILLIPS	Notice Of Service
8/11/2010	NOTC	OPPELT	Notice of Intent to Take Default

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
3/13/2010	REPL	OPPELT	Reply of Rimar Construction, Inc. and Ivan Rimar to Second Amended Answer, Counterclaim and Cross Claim Steve Verby
8/22/2010	MISC	PHILLIPS	*****BEGIN FILE NO. 6***** Steve Verby
8/23/2010	MOTN	PHILLIPS	Plaintiff's Motion for Reconsideration Steve Verby
	NTSD	PHILLIPS	Notice Of Service Of Discovery Documents Steve Verby
	MEMO	PHILLIPS	Memorandum RE: Motions for Reconsideration Steve Verby
	NOFH	PHILLIPS	Notice Of Hearing Re: Plaintiff's Motion for Reconsideration - Sept 8, 2010 Steve Verby
	HRSC	PHILLIPS	Hearing Scheduled (Motion 09/08/2010 10:00 AM) Plaintiff's Motion for Reconsideration Steve Verby
9/1/2010	REPL	PHILLIPS	Defendant Donnelly's Reply Memorandum in Support of Motion for Reconsideration Steve Verby
9/8/2010	CMIN	RASOR	Court Minutes Hearing type: Motions Hearing date: 9/8/2010 Time: 10:11 am Courtroom: Court reporter: Val Larson Minutes Clerk: Sandra Rasor Tape Number: 2 Steve Verby
	CTLG	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: Court Log- Crtrm 2 for Reconsideration Steve Verby
	DCHH	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 for Reconsideration Steve Verby
	ADVS	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: Case Taken Under Advisement for Reconsideration Steve Verby
	DCHH	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: Less than 100 Plaintiff's Motion for Reconsideration Steve Verby
	ADVS	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: Case Taken Under Advisement Plaintiff's Motion for Reconsideration Steve Verby
9/9/2010	CTLG	PHILLIPS	Hearing result for Motion held on 09/08/2010 10:00 AM: Court Log- Crtrm 2 Plaintiff's Motion for Reconsideration Steve Verby
9/20/2010	NOSV	PHILLIPS	Notice Of Service (of discovery documents - Ramsden & Lyons)- re Rimar Construction Steve Verby
	NOSV	PHILLIPS	Notice Of Service (of discovery - re Mutual Casualty Co.) Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User		Judge
9/20/2010	NOSV	PHILLIPS	Notice Of Service (of discovery - re Ivan Rimar)	Steve Verby
10/20/2010	NOSV	OPPELT	Notice Of Service	Steve Verby
11/2/2010	LETT	OPPELT	Letter from Michael A. Ealy to Judge Verby	Steve Verby
11/5/2010	ORDR	CMOORE	Order Re: Motions for Reconsideration (19 pages)	Steve Verby
	CDIS	PHILLIPS	Civil Disposition entered for: Donnelly, David, Defendant; Donnelly, Kathy, Defendant; Employers Mutual Casualty Company, Plaintiff; Rimar Construction Inc, Defendant. Filing date: 11/5/2010	Steve Verby
	CDIS	PHILLIPS	Civil Disposition entered for: Donnelly, David, Defendant; Donnelly, Kathy, Defendant; Employers Mutual Casualty Company, Plaintiff; Rimar Construction Inc, Defendant. Filing date: 11/5/2010	Steve Verby
12/16/2010	MOTN	MORELAND	Motion to Withdraw as Counsel of Record	Steve Verby
	AFFD	MORELAND	Affidavit of Michael A. Ealy in Support of Motion to Withdraw as Counsel of Record	Steve Verby
	NOHG	MORELAND	Notice Of Hearing	Steve Verby
12/20/2010	LETT	OPPELT	Letter from David P. Claiborne from Ringert Law	Steve Verby
12/21/2010	HRSC	MORELAND	Hearing Scheduled (Motion to Withdraw 01/05/2011 09:30 AM)	Steve Verby
12/27/2010	MISC	OPPELT	Fax from David M. Donnelly and Kathy L.K. Donnelly Regarding Counsel of Record's Motion to Withdraw and Hearing, January 5, 2011	Steve Verby
1/5/2011	DCHH	OPPELT	Hearing result for Motion to Withdraw held on 01/05/2011 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: (Jim Reid by telephone) - Less Than 100 Pages	Steve Verby
	ORDR	OPPELT	Order Granting Leave to Withdraw as Counsel	Steve Verby
1/6/2011	PROO	MORELAND	Proof Of Service	Steve Verby
1/12/2011	NOAP	OPPELT	Notice Of Appearance	Steve Verby
	APER	OPPELT	Defendant: Donnelly, David Appearance Allen B. Ellis	Steve Verby
	APER	OPPELT	Defendant: Donnelly, Kathy Appearance Allen B. Ellis	Steve Verby
2/4/2011	ORDR	OPPELT	Supplemental Order re: Motions for Reconsideration	Steve Verby
2/18/2011	STIP	OPPELT	Stipulation	Steve Verby
2/23/2011	ORDR	PHILLIPS	Order Adopting Stipulation	Steve Verby
	JDMT	PHILLIPS	Judgment (and Rule 54 (b) Certificate)	Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User		Judge
2/23/2011	CDIS	PHILLIPS	Civil Disposition entered for: Donnelly, David, Defendant; Donnelly, Kathy, Defendant; Rimar Construction Inc, Defendant; Employers Mutual Casualty Company, Plaintiff. Filing date: 2/23/2011	Steve Verby
	HRVC	PHILLIPS	Hearing result for Court Trial - 4 Days held on 04/25/2011 09:00 AM: Hearing Vacated	Steve Verby
	STAT	PHILLIPS	STATUS CHANGED: closed	Steve Verby
3/2/2011	APSC	KELSO	Appealed To The Supreme Court-Notice of Appeal-filed by plaintiff atty	Steve Verby
	STAT	KELSO	STATUS CHANGED: Inactive	Steve Verby
3/4/2011	MEMO	OPPELT	Memorandum in Support of Motion to Amend Judgment (Rule 59(e), I.R>C.P.)	Steve Verby
	MOTN	OPPELT	Motion to Amend Judgment (Rule59(e), I.R.C.P.)	Steve Verby
	AFFD	OPPELT	Affidavit of Allen B. Ellis	Steve Verby
	MISC	OPPELT	*****Begin File 7*****	Steve Verby
3/7/2011		KELSO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Ringert Law Chartered Receipt number: 0452958 Dated: 3/7/2011 Amount: \$101.00 (Check) For: Employers Mutual Casualty Company (plaintiff)	Steve Verby
	BNDK	KELSO	Bond Posted - Cash (Receipt 452975 Dated 3/7/2011 for 100.00)	Steve Verby
3/8/2011	MEMO	OPPELT	Memorandum of Costs and Attorney Fees	Steve Verby
	AFFD	OPPELT	Affidavit of Allen B. Ellis in Support of Defendants Donnelly's Claim for Attorney Fees and Costs	Steve Verby
	AFFD	OPPELT	Affidavit of Michael A. Ealy in Support of Defendants Donnelly's Claim for Attorney Fees and Costs	Steve Verby
	AFFD	OPPELT	Affidavit of Michael G. Schmidt in Support of Defendants Donnelly's Claim for Attorney Fees and Costs	Steve Verby
3/11/2011	CCOA	KELSO	Clerk's Certificate Of Appeal-sent to ISC	Steve Verby
	NOTC	OPPELT	Notice of Telephonic Hearing	Steve Verby
	HRSC	OPPELT	Hearing Scheduled (Motion 04/20/2011 09:30 AM) to Amend Judgment (Allen B. Ellis Telephonic)	Steve Verby
3/17/2011	MOTN	OPPELT	Motion to Disallow Costs and Fees	Steve Verby
	NOTC	OPPELT	Notice of Transmission for Filing Re: Motion to Disallow Costs and Fees	Steve Verby
	NOFH	OPPELT	Notice Of Hearing Re: Motion to Disallow Costs and Fees (Telephonic)	Steve Verby
	HRSC	OPPELT	Hearing Scheduled (Motion 04/20/2011 09:30 AM) to Disallow Costs and Fees (James Reid - telephonic)	Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User		Judge
3/21/2011	MEMO	PHILLIPS	Memorandum in Support of Motion to Disallow Costs and Fees	Steve Verby
	AFFD	PHILLIPS	Affidavit of Counsel in Support of Motion to Disallow Costs and Fees	Steve Verby
3/24/2011	SCDF	KELSO	Supreme Court Document Filed- Misc-Clerk's Record/Reporter's Transcript Suspended" until Amended Appeal filed in Proper Form	Steve Verby
	ORDR	KELSO	Order Suspending Appeal-	Steve Verby
	CHJG	KELSO	Change Assigned Judge	Idaho Supreme Court
	MISC	KELSO	Miscellaneous-ISC corrections to CCOA	Idaho Supreme Court
	MISC	KELSO	Miscellaneous-CCOA returned	Idaho Supreme Court
3/30/2011	NOTA	KELSO	AMENDED NOTICE OF APPEAL-FILED BY plaintiff atty Reid	Idaho Supreme Court
		KELSO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Ellis, Allen B. (attorney for Donnelly, David) Receipt number: 0454300 Dated: 3/30/2011 Amount: \$101.00 (Check) For: Donnelly, David (defendant) and Donnelly, Kathy (defendant)	Idaho Supreme Court
	APSC	KELSO	NOTICE OF CROSS-APPEAL TO ISC- filed by Respondent atty Ellis	Idaho Supreme Court
	STAT	KELSO	STATUS CHANGED: Inactive	Idaho Supreme Court
4/5/2011	CCOA	KELSO	Amended Clerk's Certificate Of Appeal on Notice of Appeal-sent to ISC w/ corrections	Idaho Supreme Court
	CCOA	KELSO	Clerk's Certificate Of Cross-Appeal-Sent to ISC	Idaho Supreme Court
4/8/2011	MEMO	PHILLIPS	Memorandum in Opposition to Motion to Amend Judgment	Idaho Supreme Court
4/13/2011	SCDF	KELSO	Supreme Court Document Filed- Misc-"Notice of Cross Appeal Filed	Idaho Supreme Court
4/15/2011	SCDF	KELSO	Supreme Court Document Filed- Misc-NOTICE OF APPEAL FILED-CLERK'S RECORD DUE 6/14/2011- DUE TO ATTY'S 5/10/2011	Idaho Supreme Court
4/20/2011	CMIN	ANDERSON	Court Minutes Hearing type: Motion To Amend Judgment Hearing date: 4/20/2011 Time: 9:32 am Courtroom: Court reporter: Val Larson Minutes Clerk: Lynne Anderson Tape Number: CTRM 4 James Reid Allen Ellis	Steve Verby
	CTLG	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: Court Log- Crtrm 4 to Amend Judgment (Allen B. Ellis Telephonic)	Steve Verby

Employers Mutual Casualty Company vs. Rimar Construction Inc, David Donnelly, Kathy Donnelly, Ivan Rimar

Date	Code	User	Judge
4/20/2011	DCHH	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 to Amend Judgment (Allen B. Ellis Telephonic)
	DENY	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: Motion Denied to Amend Judgment (Allen B. Ellis Telephonic)
	CTLG	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: Court Log- Crtrm 4 to Disallow Costs and Fees (James Reid - telephonic)
	DCHH	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: District Court Hearing Held Court Reporter: Val Larson Number of Transcript Pages for this hearing estimated: less than 100 to Disallow Costs and Fees (James Reid - telephonic)
	ADVS	PHILLIPS	Hearing result for Motion held on 04/20/2011 09:30 AM: Case Taken Under Advisement to Disallow Costs and Fees (James Reid - telephonic)
5/20/2011	ORDR	PHILLIPS	Order Granting Plaintiff's Motion to Disallow Costs and Fees
	CDIS	PHILLIPS	Civil Disposition entered for: Donnelly, David, Defendant; Donnelly, Kathy, Defendant; Employers Mutual Casualty Company, Plaintiff. Filing date: 5/20/2011
5/31/2011	NOTA	KELSO	AMENDED NOTICE OF CROSS-APPEAL filed by atty Ellis for Defendants Donnelly
6/13/2011	SCDF	KELSO	Supreme Court Document Filed-"Notice of Amended Cross Appeal Filed"

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 MAY 24 A 10:59

MARIE SCOTT
CLERK DISTRICT COURT
[Signature]
DEPUTY

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

**PETITION FOR DECLARATORY
JUDGMENT**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, and as a complaint and cause of action against Defendants, Rimar Construction, Inc. and David and Kathy Donnelly, hereby alleges as follows:

PARTIES

1

Plaintiff, Employers Mutual Casualty Company (hereinafter "EMC"), is, and at all material

PETITION FOR DECLARATORY JUDGMENT - 1

ASSIGNED TO STEVE VERBY
DISTRICT JUDGE

017

ORIGINAL

times herein was, an Iowa corporation doing business in the State of Idaho. EMC is a licensed insurer in the State of Idaho.

2

Defendant, Rimar Construction, Inc. (hereinafter "Rimar"), is, and at all material times herein was, an Idaho corporation in good standing with its registered office and principal place of business located in Sandpoint, Bonner County, Idaho.

3

Defendants, David and Kathy Donnelly (hereinafter and collectively "Donnelly"), are, and at all material times herein were, individuals married to one another and residents of Bonner County, Idaho.

JURISDICTION

4

Rimar and Donnelly (collectively "Defendants") are located within the jurisdictional boundaries of this Court, as a result of which this Court has personal jurisdiction over Defendants.

5

This Court has jurisdiction over this Petition pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE §§ 10-1201 *et seq.* Referral of this action to the Magistrate Division of this Court is not appropriate.

VENUE

6

Defendants are located within the jurisdictional boundaries of this Court, as a result of which venue for this action is appropriate with this Court pursuant to IDAHO CODE § 5-404.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

7

On or about March 17, 2005, Rimar and Donnelly entered into a contract for the construction of certain additions, the renovation and the repair to the home of Donnelly (hereinafter "Construction Project").

8

Donnelly asserts that pursuant to the contract with Rimar for the Construction Project, Rimar was to act as the general contractor.

9

Rimar, and subcontractors and/or independent contractors retained by Rimar, performed construction on the Construction Project pursuant to the agreement between Rimar and Donnelly. Rimar discontinued work on the Construction Project on or about October 18, 2005.

10

Subsequently, Donnelly complained of problems with the Construction Project, including but not limited to: (a) unskillful work in need of repair, removal and/or completion; (b) additions that were not structurally sound or were unsafe for use; (c) installation of substandard materials; (d) improper installation of flooring; (e) breach of express and implied warranties of workmanship; (f) installation of goods in a manner that voided manufacturer warranties; (g) charging for work caused by Rimar's own errors; (h) untimely completion of construction; (i) failure to building according to applicable building codes; (j) failure to procure necessary building permits; (k) failure to complete construction (l) failure to submit invoices for materials; (m) failure to pay subcontractors; (n) failure to provide a disclosure statement; (o) improper encumbrance of the subject property; (p) violation

of the Idaho Consumer Protection Act; and (q) clouding Donnelly's title to the subject property.

11

On or about March 7, 2006, Donnelly filed a Verified Complaint in Bonner County seeking damages against Rimar, which is identified as Bonner County, Idaho Case No. CV-06-00445 (hereinafter "the Lawsuit"). The Verified Complaint specifically alleges that Rimar failed to perform the work required on the Construction Project in conformance with the agreement between Rimar and Donnelly and that Rimar failed to perform the work with good quality workmanship and in a skillful manner.

12

In the Lawsuit, Donnelly makes claims against Rimar for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, and for quiet title/declaratory relief.

13

Rimar notified EMC of the Lawsuit and EMC agreed to provide a defense to Rimar under a reservation of rights.

14

During the relevant time periods, from October 1, 2004 through October 1, 2006, EMC had the following contracts of insurance (hereafter "EMC Policies") with Rimar, which provided general commercial liability coverage: October 1, 2004 through October 1, 2005, Policy No. 2D1-32-95-05; and October 1, 2005 through October 1, 2006, Policy No. 2D1-32-95-06.

15

An actual controversy has arisen and now exists between EMC and Defendants regarding their respective rights and duties under the EMC Policies.

16

Each of the EMC Policies provides coverage for “property damage or bodily injury caused by an occurrence.” “Property Damage” is defined under the Policies as: “a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.”

17

Damages for construction defects that do not cause additional damage to property, but merely are things that do not conform to the plans and specifications, or are code violations or contract breaches, are not “property damage”, in that there is no physical injury to tangible property or loss of use involved in those types of damages. Accordingly, the EMC Policies do not provide coverage because those types of damages are not “property damage.”

18

During the time construction was ongoing, from March 2005 through October 2005, Exclusions j(5) -(6) in the EMC Policies excluded coverage for actual “property damage” to the Donnelly home:

- j. Damage to Property
- ...
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced

because “your work” was incorrectly performed on it.

“Your work” is defined as work done by the insured or on its behalf.

19

After operations were completed, Exclusion 1. in the EMC Policies excludes from coverage “property damage” to the Donnelly home caused by the work performed on it, with the exception of subcontractor work.

20

Exclusions a., b., and m. In the EMC Policies further exclude from coverage “property damage” that is expected or intended from the standpoint of Rimar, “property damage” that Rimar is obligated to pay by reason of the assumption of liability by contract, “property damage” resulting from a “defect, deficiency, inadequacy or dangerous condition” in Rimar’s work, and “property damage” resulting from a “delay or failure” by Rimar or Rimar’s subcontractors to perform a contract “in accordance with its terms.”

21

Accordingly, due to exclusions in the EMC Policies, to the extent there is “property damage” to the Donnelly home, as defined by the EMC Policies, that property damage is not covered under the EMC Policies.

22

EMC desires a judicial determination of its rights and duties, and a declaration from the Court stating whether the EMC Policies provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act and/or quiet title which do not result in actual injury to real property, and whether the EMC Policies provide coverage for

“property damage” to the Donnelly home.

23

A judicial determination is necessary and appropriate at this time under all the circumstances so that EMC may determine its duties under the insurance contract and to determine what portion of any damage award against Rimar, if any, is payable by EMC.

24

Actual confusion exists between the parties hereto as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

25

An actual controversy exists between the parties as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

26

By virtue of the foregoing, pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE §§ 10-1201 et seq., EMC respectfully requests entry of a Judgment declaring that: (a) the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act and/or quiet title which do not result in actual injury to real property; and (b) the EMC Policies do not provide coverage for “property damage” to the Donnelly home.

COURT COSTS AND ATTORNEY FEES

27

EMC has been required to retain the attorney services of Ringert Clark Chartered in order to prosecute and maintain this action.

EMC is entitled to an award of court costs incurred herein, pursuant to IDAHO CODE § 10-1210 and/or Rule 54(d) of the IDAHO RULES OF CIVIL PROCEDURE.


WHEREFORE, EMC **PRAYS** that the Court enter its decree, judgment, or order providing EMC with the following relief:

- A. Declaring that the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act and/or quiet title which do not result in actual injury to real property; and
- B. Declaring that the EMC Policies do not provide coverage for “property damage” to the Donnelly home; and
- C. Awarding EMC its court costs incurred relative to this action; and
- D. For such other and further relief as the Court deems just and appropriate under the circumstances.

DATED this 22 day of May, 2007.

RINGERT CLARK CHARTERED

by:


James G. Reid
David P. Claiborne

ORIGINAL

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB NO. 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

2007 JUN 29 P 3:10

MARIE SCOTT
CLERK DISTRICT COURT
js
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)
)
Plaintiff,)
)
vs.)
)
RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)
)
Defendants.)

CASE NO.: CV-2007-00885

NOTICE OF APPEARANCE

I. i. a.

YOU ARE HEREBY NOTIFIED that BRENT C. FEATHERSTON,
FEATHERSTON LAW FIRM, CHTD., hereby files his Notice of Appearance in the above-
entitled action as attorney of record for the Defendant, Rimar Construction, Inc., an Idaho
corporation, and copies of all further pleadings in this matter may be served upon him for and
on behalf of the Defendant at 113 South Second Avenue, Sandpoint, Idaho, 82864.

DATED this 29th day of June, 2007.

FEATHERSTON LAW FIRM, CHTD.

By: 

BRENT C. FEATHERSTON
Attorney for Defendant

NOTICE OF APPEARANCE - 1

025

Featherston Law Firm and

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

* Licensed in
Idaho & Washington

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of June, 2007, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

James G. Reid, Esq.
David P. Clairborne, Esq.
RINGERT CLARK CHARTERED
455 South Third Street
P.O. Box 2773
Boise, ID 83701-2773

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 342-4657
- Other: _____

By 

Featherston Law Firm, Inc.

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Whick
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

* Licensed in
Idaho & Washington

NOTICE OF APPEARANCE - 2

MICHAEL G. SCHMIDT ISB #6911
WILLIAM D. HYSLOP ISB #7141
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Facsimile: (208) 664-4125

CLERK OF DISTRICT COURT
2007 JUL 18 P 12:15
CLERK OF DISTRICT COURT
[Signature]

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

ANSWER

CATEGORY: I(1)(a)

FEE: \$58.00

DEFENDANTS, DAVID and KATHY DONNELLY, husband and wife, (hereinafter
"Defendants") answer the Petition for Declaratory Judgment ("Petition") as follows:

I. ANSWER

1. Defendants hereby deny each, every, and all allegations and representations set forth in Plaintiffs' Petition unless specifically admitted herein.

2. In answer to Paragraphs 1, 2, 5, 6, 13, 14 and 16 of Plaintiff's Petition, Defendants are without sufficient information to form a belief as to the truth of the matters alleged therein and therefore deny the same.

ANSWER: 1

3. In answer to Paragraphs 3, 4 and 8 of Plaintiff's Petition, Defendants admit the same.

4. In answer to Paragraphs 7, of Plaintiff's Petition, Defendants admit only that a contract was entered into, and that the contract speaks for itself. Defendants deny the remainder of said Paragraphs.

5. In answer to Paragraph 9 of Plaintiff's Petition, Defendants admit only that Rimar performed work on the Donnelly Residence, and deny the remainder of said Paragraph.

6. In answer to Paragraphs 10, 11 and 12 of Plaintiff's Petition, Defendants admit only that Plaintiffs' Verified Petition in Bonner County Case No. CV-06-00445 (and any subsequent amendments thereto) speaks for itself. Defendants deny the remainder of said Paragraphs.

7. In answer to Paragraphs 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of Plaintiff's Petition, Defendants deny the same.

II. AFFIRMATIVE DEFENSES

8. Defendants incorporate as affirmative defenses the allegations contained in Paragraphs 1-7, above.

9. Plaintiff has failed to state a claim upon which relief can be granted.

10. Plaintiff's claims are barred by the equitable doctrines of waiver, laches, unclean hands, and in pari delicto.

11. Plaintiff's claims are barred by the equitable doctrine of estoppel.

12. Plaintiff's claims are barred due to failure of a condition precedent.

13. Plaintiff has failed to join an indispensable party.

14. The losses and claims asserted by the Defendants against Rimar Construction Inc. and Ivan Rimar are not excluded from coverage of EMC's policy.

ANSWER: 2

III. DEMAND FOR JURY TRIAL

15. Defendants request a jury trial of all matters so triable.

IV. PRAYER FOR RELIEF

Wherefore, Defendants David Donnelly and Kathy Donnelly demand:

A. That Plaintiff's Petition be dismissed in its entirety and that it take nothing thereby;

B. For a determination that Plaintiff's policy covers all or some of the damages as alleged in Bonner County Case No. CV-06-00445;


C. For an award of reasonable attorney fees and costs as incurred herein pursuant to I.C. §§ 10-1201 *et seq.*, 12-120 and 12-121; In the event this matter is uncontested, a reasonable attorney fee would be \$10,000, or as set by the Court.

D. For a trial by jury of all matters so triable;

E. For such other and further relief as the Court deems just and equitable under the circumstances;

DATED this 18th day of July, 2007.

LUKINS & ANNIS, P.S.

By 
MICHAEL G. SCHMIDT ISB #6911
Attorneys for Defendants David Donnelly
and Kathy Donnelly

ANSWER: 3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
455 South Third Street
P.O. Box 2773
Boise, ID 83701-2773
Fax: (208) 342-4657

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)



MICHAEL G. SCHMIDT

ANSWER: 4

ORIGINAL

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB NO. 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

2007 JUL 26 P 3:30
CLERK OF DISTRICT COURT
IDAHO

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)
)
Plaintiff,)
)
vs.)
)
RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)
)
Defendants.)
_____)

CASE NO.: CV-2007-00885

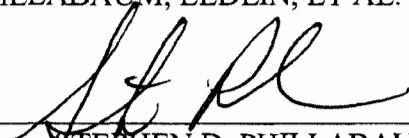
**NOTICE OF SUBSTITUTION
OF COUNSEL**

COMES NOW Brent C. Featherston, Featherston Law Firm, Chtd., counsel for the Defendant, Rimar Construction, Inc. in the above-entitled matter, and hereby notifies the Court and Counsel that STEPHEN D. PHILLABAUM, ISB No. 5127, PHILLABAUM, LEDLIN, MATTHEWS & SHELDON, PLLC, shall be substituted as counsel of record for the Defendant, Rimar Construction, Inc., in all further proceedings in this matter, and that copies of all notices and pleadings should be directed to Stephen D. Phillabaum at 421 W. Riverside, Suite 900, Spokane, Washington 99201; telephone number (509) 838-6055; fax number (509) 625-1909.

DATED this 25 day of July, 2007.

PHILLABAUM, LEDLIN, ET AL.

FEATHERSTON LAW FIRM, CHTD.

By 
STEPHEN D. PHILLABAUM

By 
BRENT C. FEATHERSTON

CERTIFICATE OF MAILING

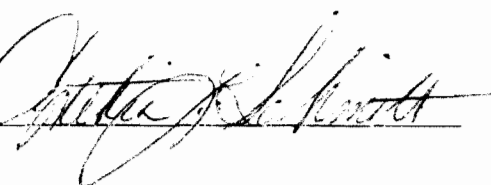
I hereby certify that on the 26th day of July, 2007, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

James G. Reid, Esq.
David P. Clairborne, Esq.
RINGERT CLARK CHARTERED
455 South Third Street
P.O. Box 2773
Boise, ID 83701-2773
Attorneys for Plaintiff EMC

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 342-4657
- Other: _____

Michael G. Schmidt, Esq.
LUKINS & ANNIS, P.S.
250 Northwest Boulevard, Suite 102
Coeur d'Alene, Idaho 83814-4125
Attorney for Defendants Donnelly

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-4125
- Other: _____

By 

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

2007 AUG -1 A 10 22

CLEARENCE COURT
[Signature]

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; and **DAVID** and
KATHY DONNELLY, husband and wife;

Defendants.

Case No. CV-2007-00885

**NOTICE OF INTENT TO TAKE
DEFAULT**

TO: RIMAR CONSTRUCTION, INC. and Stephen D. Phillabaum, its attorney of record:

NOTICE IS HEREBY GIVEN that the Plaintiff above-named will make application for entry of default and default judgment against Defendant above-named on or after August 8, 2007. Such action will be taken for failure to responsively plead to the Complaint previously filed and served herein upon the Defendant on June 27, 2007. This Notice is given pursuant to Rule 55(b)(2) of the *Idaho Rules of Civil Procedure*.

NOTICE OF INTENT TO TAKE DEFAULT - 1

DATED this 30th day of July, 2007.

RINGERT CLARK CHARTERED

by:


James G. Reid

CERTIFICATE OF SERVICE

This does hereby certify that on the 30th day of July, 2007, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971


James G. Reid

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
5 (208) 263-6866
6 (208) 263-0400 (Fax)

2007 AUG -1 P 2:25



7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC
9 STEPHEN D. PHILLABAUM, ISB NO. 5127
10 421 West Riverside, Suite 900
11 Spokane, Washington, 99201
12 (509) 838-6055
13 (509) 625-1909 (Fax)

14 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
15 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

16 EMPLOYERS MUTUAL CASUALTY
17 COMPANY, an Iowa corporation,

NO. CV-2007-00885

18 Plaintiff,

RIMAR CONSTRUCTION INC.'S
ANSWER TO PLAINTIFF'S
PETITION FOR DECLARATORY
JUDGMENT, COUNTERCLAIM, AND
REQUEST FOR JURY TRIAL

19 v.

Category: I(1)(a)

20 RIMAR CONSTRUCTION, INC., an Idaho
21 corporation; and DAVID and KATHY
22 DONNELLY, husband and wife,

Fee: \$17.00

23 Defendants.

24 COMES NOW defendant RIMAR CONSTRUCTION, INC. ("RCI"), by and through its attorney
25 Stephen D. Phillabaum and Phillabaum, Ledlin, Matthews & Sheldon, PLLC, and submits the following
26 Answer to plaintiff's Petition for Declaratory Judgment.

27 PARTIES

28 1

RCI is without sufficient information to admit or deny this allegation, therefore it is denied.

RCI'S ANSWER TO PLAINTIFF'S
PETITION FOR DECLARATORY JUDGMENT - I

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

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RCI admits paragraph 2 of plaintiff's Petition for Declaratory Judgment.

3

RCI admits paragraph 3 of plaintiff's Petition for Declaratory Judgment.

JURISDICTION

4

RCI admits paragraph 4 of plaintiff's Petition for Declaratory Judgment.

5

RCI denies that a justiciable controversy exists between plaintiff and defendant Donnelly and therefore denies.

VENUE

6

RCI admits paragraph 6 of plaintiff's Petition for Declaratory Judgment.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

7

RCI admits that RCI and Donnelly entered into a contract, the terms of which speak for themselves.

8

RCI is without sufficient information to admit or deny this allegation, therefore it is denied.

9

RCI admits performing work for the Donnellys. RCI denies the remainder of paragraph 9.

10

RCI admits the Donnellys filed a lawsuit against RCI in Bonner County, Case #CV-06-00445, that contained the alleged problems. The Donnellys subsequently filed an amended complaint alleging additional claims, including claims for bodily injury.

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11

RCI admits that Donnelly filed a Verified Complaint on March 7, 2006, which alleges multiple claims against RCI that generally include, but are not limited to, claims of faulty workmanship. Donnelly subsequently filed an Amended Verified Complaint making additional alleged claims, including, but not limited to, claims for bodily injury.

12

RCI admits paragraph 12 of plaintiff's Petition for Declaratory Judgment. Donnelly subsequently filed an Amended Verified Complaint making additional alleged claims, including, but not limited to, claims for bodily injury.

13

RCI admits paragraph 13 of plaintiff's Petition for Declaratory Judgment.

14

RCI admits paragraph 14 of plaintiff's Petition for Declaratory Judgment.

15

RCI denies that an actual controversy exists between plaintiff and Donnelly and therefore denies.

16

RCI admits paragraph 16 of plaintiff's Petition for Declaratory Judgment, to the extent it quotes portions of the EMC policy.

17

RCI denies paragraph 17 of plaintiff's Petition for Declaratory Judgment.

18

RCI denies paragraph 18 of plaintiff's Petition for Declaratory Judgment.

19

RCI denies paragraph 19 of plaintiff's Petition for Declaratory Judgment.

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RCI admits paragraph 20 of plaintiff's Petition for Declaratory Judgment, to the extent it quotes portions of the EMC policy.

21

Paragraph 21 of plaintiff's Petition for Declaratory Judgment is a legal conclusion requiring no response from RCI. To the extent a response is required, RCI denies the same.

22

No response to paragraph 22 of plaintiff's Petition for Declaratory Judgment is required. To the extent an answer is required, RCI requests that plaintiff's request for declaration be denied.

23

RCI denies paragraph 23 of plaintiff's Petition for Declaratory Judgment.

24

RCI denies that any confusion exists between plaintiff and Donnelly and therefore denies.

25

RCI denies that an actual controversy exists between plaintiff and Donnelly or RCI and Donnelly with respect to the EMC policy and therefore denies.

26

RCI respectfully requests entry of judgment declaring that the EMC policy does provide coverage for the claimed damages outlined in this paragraph, as well as other damages claimed by Donnelly and costs of defense in the Donnelly action.

COURT COSTS AND ATTORNEY FEES

27

RCI denies paragraph 27 of plaintiff's Petition for Declaratory Judgment.

28

RCI denies paragraph 28 of plaintiff's Petition for Declaratory Judgment.

1 coverage. The Donnellys were not insured under the EMC policy, were not beneficiaries of the policy,
2 were not privy to the policy, and had not right to notice under the policy.

3 12. The May 22, 2007, letter from EMC's counsel was the first notice RCI had that its insurer
4 intended to sue RCI in a declaratory judgment action.

5 13. During the mediation, EMC offered minimal contribution towards the proposed
6 settlement and coerced RCI to offer its own funds to resolve the Donnellys' claims.

7 14. EMC knew it would not offer enough to settle the matter at mediation.

8 15. Due to EMC's notice of the declaratory judgment action on the eve of mediation, RCI
9 was unable to secure sufficient funds for the mediation and the mediation was unsuccessful.

10 16. During the mediation, EMC made offers of settlement substantially below the amount
11 it believed would be reasonably necessary to resolve the claims asserted by the Donnellys and coerced
12 RCI to offer its own funds to settle those claims. EMC conducted the settlement negotiations based on
13 its predetermination that it would not afford coverage to RCI.

14 17. EMC's participation in the mediation was detrimental to success of the mediation because
15 it did not engage in good faith negotiations.

16 18. After the mediation, EMC continued to suggest to RCI that it expend its own funds to
17 resolve the claims.

18 19. Donnelly, as a result of receiving EMC's notice regarding the pending declaratory
19 judgment action against RCI, filed an amended complaint personally naming Ivan Rimar as an additional
20 defendant and adding further causes of action and further claims for damages against both RCI and Ivan
21 Rimar.

22 20. The true purpose for Donnelly filing the amended complaint was to ensure coverage under
23 the EMC policy. The effect was to embroil Mr. Rimar personally into the action and expose him and his
24 company to additional damages claims.

1 21. EMC put its own financial interests ahead of RCI's by demanding RCI use its own funds
2 in an attempt to settle the Donnelly action and by notifying the Donnellys of its intent to file the
3 declaratory judgment action, when it knew or should have known that the notification would impair the
4 mediation's potential for success and cause the Donnellys to bring additional claims against RCI and Ivan
5 Rimar personally.

6 22. EMC knew or should have known that Idaho law does not allow an insurer to indefinitely
7 delay commitment to coverage under a reservation of rights.

8 23. EMC's filing of this action more than a year after notice of the Donnelly claim was to
9 improperly coerce RCI into offering its own funds in an attempt to settle the Donnelly litigation.

10 **FIRST CAUSE OF ACTION**

11 **BAD FAITH**

12 Defendants/Counterclaimants reallege paragraphs 1 through 23 of the counterclaim as fully set
13 forth herein.

14 24. EMC acted in bad faith by putting its own financial interests ahead of the interests of its
15 insured when it notified the Donnellys that it would be filing a declaratory judgment action on the eve
16 of mediation, taking control of the defendant's mediation efforts, and failing to bargain in good faith at
17 the mediation.

18 25. EMC acted in bad faith when it coerced RCI into offering its own funds to settle the
19 Donnelly claims in an effort to resolve the claims against EMC.

20 26. EMC acted in bad faith by causing the Donnellys to amend their complaint asserting
21 claims against Ivan Rimar personally and asserting additional causes of action against both RCI
22 Construction and Ivan Rimar in order to ensure insurance coverage.

23 27. EMC acted in bad faith when it disregarded Idaho law and improperly filed this action
24 more than a year after notice of the Donnellys' claims.

25
26
27
28 RCI'S ANSWER TO PLAINTIFF'S
PETITION FOR DECLARATORY JUDGMENT - 7

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6053

1 28. EMC acted in bad faith when it brought this claim against the Donnellys who are
2 strangers to the insurance contract. EMC's actions potentially expose RCI to liability for Donnellys'
3 attorney fees in this and the Donnelly action and further thwarts potential settlement of all claims.

4 29. EMC's failure to negotiate in good faith increased Donnellys' attorney fees in preparation
5 for and doing the mediation when EMC knew it would not offer enough to settle the Donnelly claims.
6 These increased fees interfere with RCI's ability to settle Donnellys' claims.

7 **SECOND CAUSE OF ACTION**

8 **CONSUMER PROTECTION ACT VIOLATION**

9 Defendants/Counterclaimants reallege paragraphs 1 through 29 of the counterclaim as fully set
10 forth herein.

11 30. EMC's conduct constitutes an unfair and deceptive act or practice under Idaho's
12 Consumer Protection Act (IDAHO CODE §§48-601).

13 **THIRD CAUSE OF ACTION**

14 **BREACH OF CONTRACT**

15 Defendants/Counterclaimants reallege paragraphs 1 through 30 of the counterclaim as fully set
16 forth herein.

17 31. EMC had a continuing duty under the policy to provide a defense to RCI and its officers,
18 directors, and stockholders, including Ivan Rimar. Inherent in the duty to defend is a duty to provide
19 competent legal representation for the purposes of reducing the financial exposure of the insureds. EMC
20 breached its contractual obligation by exposing RCI and Ivan Rimar to greater financial risk than it
21 otherwise would have, when it created a situation that resulted in additional claims being brought by the
22 Donnellys.

23 **REQUEST FOR JURY**

24 Defendant requests a trial by a jury of twelve members.

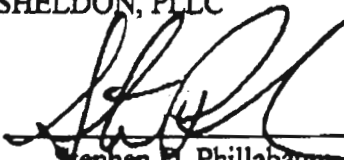
CONCLUSION

Wherefore defendant/counterclaimant prays for entry of judgment as follows:

- 1. Dismissing plaintiff's Petition for Declaratory Relief.
- 2. Awarding defendant/counterclaimant damages on their counterclaims in an amount to be proven at trial.
- 3. Awarding defendant/counterclaimant costs and reasonable attorney fees.
- 4. Other relief the Court deems just and equitable.

DATED this 1 day of August, 2007.

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC

By 
 Stephen B. Phillabaum, ISB #5127
 Attorneys for Rimar Construction, Inc.

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#71011

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 1st day of August, 2007, a true and correct copy of RIMAR'S ANSWER TO PETITION FOR DECLARATORY JUDGMENT, COUNTERCLAIM, AND REQUEST FOR JURY TRIAL, to which this declaration is attached, was served by the method indicated below, and addressed to the following:

James G. Reid

David P. Claiborne

Ringert Clark Chartered

455 South Third Street

P.O. Box 2773

Boise, Idaho 83701-2773

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax): (208) 342-4657

Michael G. Schmidt

William D. Hyslop

Lukins & Annis, P.S.

250 Northwest Blvd., Suite 250

Coeur d'Alene, Idaho 83814-2971

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (Fax): (208) 664-4125

DATED: 8/1/07

Shannan Tyo Sheldon
Shannan Tyo Sheldon

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

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CLEARED FOR COURT
Ulm
ORIGINAL

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

**MOTION TO DISMISS DEFENDANT
RIMAR CONSTRUCTION'S
COUNTERCLAIM**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, and, **PURSUANT TO** Rule 12(b)(6) of the Idaho Rules of Civil Procedure, and **HEREBY MOVES THE COURT to DISMISS, WITH PREJUDICE**, the Counterclaims alleged by Defendant Rimar Construction, Inc.

Good grounds and a proper basis exist to grant the relief requested herein by reason that the facts alleged by Defendant Rimar Construction in its Counterclaim fail to state, as a matter of

MOTION TO DISMISS DEFENDANT RIMAR CONSTRUCTION'S COUNTERCLAIM - 1

law, appropriate claims for relief against Plaintiff. This Motion is supported by the pleadings and documents on record in this action, as well as by the Memorandum in Support of Motion to Dismiss Defendant Rimar Construction's Counterclaim, which is filed herewith.

Oral argument on this Motion is respectfully requested.

DATED this 15th day of August, 2007.

RINGERT CLARK CHARTERED

by:



James G. Reid

David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 15th day of August, 2007 by the following method:

**BRENT C. FEATHERSTON
FEATHERSTON LAW FIRM**

113 South Second Avenue
Sandpoint, Idaho 83864
Telephone: (208) 263-6866
Facsimile: (208) 263-0400
E-Mail: n/a

Attorneys for Rimar Construction

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**

421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: n/a

Attorneys for Rimar Construction

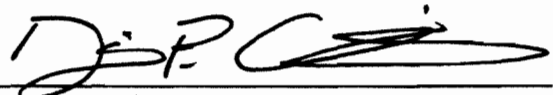
- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MICHAEL G. SCHMIDT
LUKINS & ANNIS**

250 Northwest Blvd., Ste. 102
Coeur d'Alene, Idaho 83814-2971
Telephone: (208) 667-0517
Facsimile: (208) 664-4125
E-Mail: n/a

Attorneys for David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne

CLERK DISTRICT COURT
2007 AUG 30 A 10:18

CLERK DISTRICT COURT
cfm

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)

Plaintiff,)

vs.)

RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife;)

Defendants.)

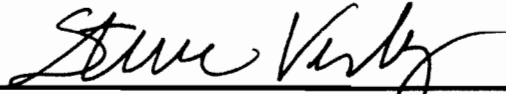
CASE NO: CV-2007-0000885

SCHEDULING ORDER

IT IS HEREBY ORDERED that each party shall complete and file with the Clerk of Court the attached Scheduling Form. A copy of the Scheduling Form filed with the court shall be served on all parties and one copy shall be submitted to Judge Verby at his chambers in Sandpoint, 215 S. First Avenue, Sandpoint, ID 83864. In the alternative, a written stipulation containing the requested information may be submitted.

The Scheduling Form or stipulation must be completed and filed within fourteen (14) days from the date of this Order. If not returned, this matter will be set for trial at the Court's discretion.

DATED this 30th day of August, 2007.



Steve Verby
District Judge

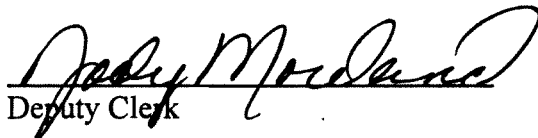
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, U.S. postage prepaid, this 30 day of August, 2007, to the following:

James G. Reid
Attorney at Law
PO Box 2773
Boise, ID 83701-2773

Michael G. Schmidt
Lukins & Annis, PS
Suite 102
250 Northwest Blvd.
Coeur d'Alene, ID 83814-2971

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews
& Sheldon, PLLC
421 West Riverside, Suite 900
Spokane, WA 99201


Deputy Clerk

SCHEDULING FORM

In response to the Scheduling Order, please complete this form and file it within 14 days, with service of copies to all parties and one copy to Judge Verby's chambers in Sandpoint.

1. Case Title: Employers Mutual Casualty Company v. Rimar Construction Inc., etal.
2. Case Number: CV-2007-0000885 (Bonner County)
3. Nature of Claims: _____
4. Court or Jury Case: _____
5. Number of Days Needed for Trial: _____
(If requesting more than five (5) days, please explain the reasons below.)
6. Should the court order mediation? Yes _____ No _____
7. Will you schedule a motion for summary judgment? Yes _____ No _____
Note: If you wish to schedule a motion for summary judgment, please contact Cherie Moore, (208) 265-1445, as soon as possible for scheduling.
8. The undersigned agrees to the following pretrial schedule unless specifically noted otherwise:
 - a. Plaintiffs disclose expert witnesses by **90** days before trial.
 - b. Defendants disclose expert witnesses by **60** days before trial.
 - c. **Last day** for hearing motions for summary judgment is **60 days** before trial.
 - d. The other deadlines in the court's standard pre-trial order.
9. Comments: _____

Dated this _____ day of _____, 2007.

Sign and Print or Type Attorney's Name

Attorney for _____
Print or Type Client's Name

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
5 (208) 263-6866
6 (208) 263-0400 (Fax)

7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC
9 STEPHEN D. PHILLABAUM, ISB NO. 5127
10 421 West Riverside, Suite 900
11 Spokane, Washington, 99201
12 (509) 838-6055
13 (509) 625-1909 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT
2007 SEP --4 P 3: 35

PHILLABAUM, LEDLIN, MATTHEWS & SHELDON, PLLC
u/fm

9 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

11 EMPLOYERS MUTUAL CASUALTY
12 COMPANY, an Iowa corporation,

13 Plaintiff,

14 v.

15 RIMAR CONSTRUCTION, INC., an Idaho
16 corporation; and DAVID and KATHY
DONNELLY, husband and wife,

17 Defendants.

NO. CV-2007-00885

DEFENDANT/COUNTERCLAIMANT
RIMAR CONSTRUCTION, INC.'S
MEMORANDUM IN OPPOSITION TO
DISMISS COUNTERCLAIM

18 COMES NOW defendant/counterclaimant RIMAR CONSTRUCTION, INC., by and through
19 its attorney of record, Stephen D. Phillabaum and Phillabaum, Ledlin, Matthews & Sheldon, PLLC, and
20 submits the following memorandum in opposition to plaintiff's Motion to Dismiss Defendant's
21 Counterclaims.

22 I. STATEMENT OF THE CASE

23 Plaintiff's motion to dismiss substantially mischaracterizes the counterclaims asserted, the relief
24 requested, and Idaho law.

25 Defendant Rimar Construction, Inc. ("RCT") does not dispute plaintiff's right to assert its coverage
26 defenses, including its right to request declaratory relief on the coverage issues. However, plaintiff's

27 RCT'S MEMO IN OPPOSITION TO
28 DISMISS COUNTERCLAIM - 1

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

1 obligations towards RCI extend beyond mere contractual duties. They include the duties to exercise
2 reasonable care for the benefit of RCI; to make timely investigation and determination of coverage
3 disputes; and to give equal consideration to its insured's interests as to its own monetary interest.
4 *McKinley v. Guaranty Nat'l Ins. Co.*, 159 P.3d 884, 2007, Idaho Lexis (May 3, 2007).

5 Plaintiff breached its duties to RCI by unreasonably delaying its coverage determination; by
6 placing its own financial interests ahead of the interests of its insured; by failing to engage in good faith
7 settlement negotiations of the claims against RCI after agreeing to do so; by intentionally interfering with
8 RCI's settlement negotiations; and by failing to keep RCI fully informed of its coverage investigation so
9 that RCI could make informed decisions about the defense of its case.

10 As a result of plaintiff's unreasonable acts, RCI, and its president, Ivan Rimar, have incurred
11 additional litigation costs and have been embroiled in expanded litigation by the plaintiffs in the
12 underlying action.

13 On the face of RCI's counterclaims, plaintiff's motion to dismiss must be denied.

14 II. LEGAL ANALYSIS

15 A. RCI has Pled Sufficient Facts to Support Its Counterclaims.

16 A Rule 12(b)(6) motion is not the proper procedure for resolving a contest about the facts or
17 merits of a case. *Harper v. Harper*, 122 Idaho 535, 538, 835 P.3d 1346 (2002). Rather, the purpose of
18 a Rule 12(b)(6) motion is to test the formal sufficiency of the statement of the claim for relief *Id.*

19 RCI's counterclaim asserts claims that EMC acted in bad faith and that it breached its contract
20 with RCI. EMC does not dispute that these are cognizable claims against an insurance company. Rather,
21 it claims that the particular facts or merits of the case are insufficient to support a claim for relief.

22 As discussed, *infra*, RCI does not dispute EMC's right to file a declaratory action. Rather, RCI
23 contends that the manner in which EMC introduced the declaratory action into the underlying dispute was
24 detrimental to RCI's defense. In support of its counterclaim RCI has pled that:

- 25 • EMC had improper ex-parte contact with the Donnellys;

- 1 • EMC failed to keep RCI properly informed of its coverage investigation;
- 2 • EMC coerced RCI to expend its own funds to settle the claim before EMC had made a
- 3 coverage determination;
- 4 • EMC prejudiced RCI's ability to defend and settle the Donnellys' claims;
- 5 • EMC's actions embroiled RCI and Ivan Rimar in expanded litigation with the Donnellys;
- 6 • EMC put its own financial interests ahead of RCI's; and
- 7 • EMC failed to make a timely coverage determination.

8 For purposes of EMC's motion, these averments must be presumed true. RCI has sufficiently pled the
9 relief requested and the factual support for the relief. As such, dismissal of the counterclaims is improper.

10 B. Plaintiff's Duty of Good Faith Extends Beyond Its Contractual Obligations.

11 Contrary to EMC's assertion, insurance companies have a duty to act in good faith that exists
12 independent of the insurance contract and independent of statute. *White v. Unigard Mut. Ins. Co.*, 112
13 Idaho 94, 730 P.2d 1014 (1986). Such duty is beyond that which the policy imposes by itself — the duty
14 to defend, settle, and pay — but is a duty imposed by law on insurers to act fairly and in good faith in
15 discharging its contractual duties. *Id.* Bad faith is not just a tortious breach of contract, it is a separate
16 wrong that results from a breach of the duty imposed as a consequence of the relationship established by
17 the contract. *Id.* Thus, the insurance contract and the relationship it creates contains more than the
18 company's bare promise to pay certain claims when it is forced to do so; implicit in the contract and the
19 relationship is the insurer's obligation to play fairly with its insureds. *Id.* As such, an insured can also
20 bring an independent action in tort for the insurer's bad faith in unreasonably denying or unreasonably
21 delaying settlement of a claim. *Robinson v. State Farm Mut. Auto Ins. Co.*, 137 Idaho 173, 178, 45 P.3d
22 829 (2002).

23 Furthermore, an insurer's bad conduct need not be intentional to give rise to a claim of bad faith,
24 mere negligence will suffice. *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d
25 1243 (1988). ("We extend the *White v. Unigard* holding, and distinguish it to the extent that it may be
26

1 construed to be inconsistent with today's decision, to cover negligent, as well as intentional denials or
2 delays of the payment of insurance claims.")

3 While Idaho courts have yet to specifically address an insurer's duty when defending under a
4 reservation of rights, other jurisdictions have held that an enhanced duty of good faith exists in such
5 situations. *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). The
6 *Tank* court stated that because of the "potential conflicts of interests between insurer and insured inherent
7 in this type of defense," the insurer has an "enhanced obligation to its insured as part of its duty of good
8 faith." 105 Wn.2d at 387. The *Tank* court outlined the following specific criteria the insurer must meet
9 to satisfy its good faith obligations: 1) it must thoroughly investigate the claims against the insured; 2)
10 retain competent counsel for the insured; 3) fully inform the insured regarding the reservation of rights
11 defense along with all developments relevant to coverage and the status of the lawsuit; and 4) avoid
12 engaging in *any* action that would *suggest* it is placing its own monetary interests before the insured's.
13 *Id.* at 387-88.

14 Idaho courts have stated their disfavor of declaratory judgment petitions during the pendency of
15 an underlying action. *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 972 695 P.2d
16 346, 357 (1984) (when an insurer assumes defense under a reservation of rights, declaratory relief must
17 be sought "following judgment in the underlying case"). This is particularly true when the insurer fails
18 to raise a coverage issue in a timely manner. *Id.* at 970-71 (insurer's declaratory action filed 14 months
19 after assuming defense under a reservation of rights is viewed with a "jaundiced eye").

20 Here, EMC was aware of potential coverage defenses as early as May 25, 2006, when it issued
21 its initial letter acknowledging the claim. From that time until May 24, 2007, EMC did not warn RCI of
22 its intent to file a declaratory action on the eve of mediation, or the ramifications of such actions.
23 However, as soon as RCI's counsel (who was retained by EMC) scheduled mediation with the Donnellys,
24 EMC immediately filed the present action. Prior to filing the declaratory action, EMC substantially
25 controlled the defense, investigation, and evaluation for the Donnellys' claims. Because EMC had
26

27 RCI'S MEMO IN OPPOSITION TO
28 DISMISS COUNTERCLAIM - 4

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 834-6035

effectively controlled the investigation of the Donnellys' claims, both factually and legally, it was in a superior position to negotiate and mitigate those claims at mediation. However, during the mediation, EMC washed its hands of RCI, asserting a position of no coverage for the damages claimed by the Donnellys. EMC offered a nuisance value contribution towards the settlement, and from that point forward pressured RCI to expend its own funds to settle the Donnellys' claims. The effect of the settlement, using primarily RCI's own money, would be to absolve EMC both of its ongoing duty to defend and its duty to indemnify. The latter of which has yet to be determined by this Court. EMC made a unilateral coverage determination and used it to its advantage (and to the disadvantage of RCI) during the mediation.

Additionally, EMC's filing of the declaratory judgment on the eve of mediation constitutes a breach of duty to keep RCI adequately informed of its coverage investigation and further suggests that it placed its own monetary interests before its insured by constructively advising the parties that, despite its agreement to mediate the matter in good faith, it intended to deny indemnification of RCI.

EMC's actions put both RCI and its defense counsel in the untenable position of guessing whether EMC would provide coverage and whether RCI should settle the claims against it with its own funds or wait indefinitely for a coverage determination. Under these circumstances, the mediation was fruitless.

EMC had an obligation to timely investigate its coverage determination independent of the tort defense. Once an insurer accepts a duty to defend under a reservation of rights, if that duty is performed in bad faith, it is no less liable than if it denied its duty from the start. 1A R. LONG, LIABILITY INSURANCE §5B.15 at 143 (1986). EMC took control of RCI's defense and, with that control, assumed an enhanced duty of care to protect RCI's interest. When EMC "pulled the plug" during the mediation, it violated its duty to refrain from action that suggests it is placing its own financial interest ahead of its insured's. EMC had numerous options in its coverage defense: 1) it could have denied coverage to RCI at any time during the year preceding the mediation and allowed RCI to seek its appropriate remedies; 2) it could have sought declaratory judgment in a timely manner before the mediation; 3) it could have sought declaratory judgment after conclusion of the mediation to determine its indemnification obligations. Instead, EMC

1 bided its time, used the underlying suit against RCI as a discovery mechanism to support its declaratory
2 action, published the fact that it was disputing coverage to the plaintiffs, then used the declaratory action
3 as leverage against RCI at the most opportune time.

4 C. The Donnellys are not Indispensable Parties to this Action

5 Contrary to EMC's assertion, the Donnellys are not necessary parties to this declaratory action.
6 Injured third parties are not necessary parties in an action brought by an insurer for a declaratory judgment
7 determining its liability thereunder. *Hartman v. United Hert. Prop. & Cas. Ins. Co.*, 141 Idaho 193, 196,
8 108 P.3d 340 (2005), citing *Temperance Ins. Exchange v. Carver*, 83 Idaho 487, 490, 365 P.2d 824
9 (1961). Idaho does not recognize a direct cause of action by a third party against an insurer. *Downing v.*
10 *Travelers Ins. Co.*, 107 Idaho 511, 514-15, 691 P.2d 375 (1984).

11 Any judgment obtained by the Donnellys against RCI would have no effect on the outcome of
12 this declaratory action. The Donnellys have no standing to assert a right to coverage under the EMC
13 policy. The declaratory action affects only EMC's obligations to RCI to afford indemnification of
14 Donnellys' claims. The Donnellys have no cognizable interest in EMC's and RCI's contractual dispute
15 and, therefore, no such interest can be impaired.

16 By naming the Donnellys in this action, EMC again put its own interest ahead of RCI. First, the
17 suit effectively notified the Donnellys that they should look only to RCI (and not EMC) for recovery.
18 Second, it caused the Donnellys to incur additional legal expense, for which it will look to RCI for
19 recovery. Third, it unnecessarily exposed the Donnellys to payment of EMC's costs and fees, which,
20 again, they must attempt to recover from RCI. Fourth, the timing of the declaratory action had a chilling
21 effect on the prospects for a mediated settlement when all parties, including EMC, agreed to mediate in
22 good faith. Finally, and most importantly, it caused the Donnellys to amend their claims against RCI and
23 add its president, Ivan Rimar, as a defendant in the underlying action. The only possible reason EMC
24 could have in naming the Donnellys in the declaratory action was to broadcast to all of the parties EMC's
25 intent to sideline itself from the settlement negotiations.

1 D. EMC Breached its Duty to Fairly Represent RCI and Therefore Breached the Insurance
2 Contract.

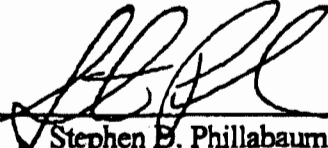
3 Every contract imposes upon each party a duty of good faith and fair dealing in its performance
4 and enforcement. RESTATEMENT (2ND) OF CONTRACTS, §2057 (1979). As stated, *supra*, RCI does not take
5 issue with EMC's right to enforce the terms of the insurance contract through the declaratory judgment
6 mechanism. However, in doing so, it must do so in such a way that RCI's interests in resolution of the
7 underlying claims are not prejudiced. For the foregoing reasons, RCI submits that the timing of EMC's
8 filing of this action shows its intent to unfairly preserve its own interests over those of its insured. Thus,
9 EMC has breached the implied duty of good faith and fair dealing, which necessarily constitutes a breach
10 of the contract.

11 III. CONCLUSION

12 For the foregoing reasons, RCI respectfully submits that plaintiff's Motion to Dismiss Defendant
13 Rimar Construction's counterclaims must be DENIED.

14 RESPECTFULLY SUBMITTED this 4 day of September, 2007.

15 PHILLABAUM, LEDLIN, MATTHEWS
16 & SHELDON, PLLC

17 By 
18 Stephen B. Phillabaum, IBA #5127
19 Attorneys for RCI

20 CERTIFICATE OF SERVICE

21 I declare under penalty of perjury of the laws of the state of Washington that on the 4th day
22 of September, 2007, a true and correct copy of RCI'S MEMO IN OPPOSITION TO DISMISS
23 COUNTERCLAIM, to which this declaration is attached, was served by the method indicated below, and
24 addressed to the following:

23 James G. Reid
24 David P. Claiborne
25 Ringert Clark Chartered
26 455 South Third Street
27 P.O. Box 2773
28 Boise, Idaho 83701-2773

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax): (208) 342-4657

RCI'S MEMO IN OPPOSITION TO
DISMISS COUNTERCLAIM - 7

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WBS RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

1 Michael G. Schmidt
2 William D. Hyslop
3 Lukins & Annis, P.S.
4 250 Northwest Blvd., Suite 250
5 Coeur d'Alene, Idaho 83814-2971

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax): (208) 664-4125

6 DATED: 9/4/07

7 *Shannan Tyo Sheldon*
8 _____
9 Shannan Tyo Sheldon

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26 #71011

27 RCI'S MEMO IN OPPOSITION TO
28 DISMISS COUNTERCLAIM - 8

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6053

MICHAEL G. SCHMIDT
ISB# 6911
WILLIAM D. H YSLOP
ISB# 7141
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Fax: (208) 664-4125

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 SEP -4 P 12: 58

MARIE SCOTT
CLERK DISTRICT COURT
u/m
DEPUTY

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY,
COMPANY, an Iowa Corporation,

Plaintiff,

vs.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

MOTION TO STAY PROCEEDINGS /
NOTICE OF HEARING

Defendants DAVID and KATHY DONNELLY, husband and wife, move this Court for an order staying the proceedings in this matter pending the resolution of Bonner County Case No. CV 06-00445 (hereinafter "the underlying action"). This Motion to Stay Proceedings is made on the basis that: (1) this action will necessarily address issues that are already being addressed in the underlying action; (2) a declaratory judgment action is improper under the circumstances; and (3) the Plaintiff/insurer EMPLOYERS MUTUAL CASUALTY, COMPANY did not act with reasonable promptness. This Motion is further supported by the Memorandum filed herewith in support of this Motion.

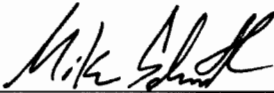
MOTION TO STAY PROCEEDINGS / NOTICE OF HEARING

- 1 -

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DATED this 31st day of August, 2007.

LUKINS & ANNIS, P.S.

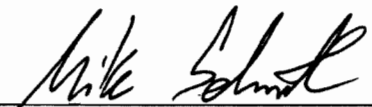
By 
MICHAEL G. SCHMIDT
Attorneys for Defendants David and
Kathy Donnelly

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Defendants DAVID and KATHY DONNELLY will bring the above **Motion to Stay Proceedings** on the 19th day of September, 2007 at the hour of 3:30 pm, or as soon thereafter as the parties may be heard, before the Honorable Steven Verby in the Bonner County Courthouse, located at 215 South 1st Avenue in Sandpoint, Idaho.

DATED this 31st day of August, 2007.

LUKINS & ANNIS, P.S.

By 
MICHAEL G. SCHMIDT
Attorneys for Defendants David and
Kathy Donnelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

JAMES G. REID
DAVID P. CLAIBORNE
Ringert Clark Chartered
455 S. Third Street
P.O. Box 227
Boise, ID 83701-2773
Fax: (208) 342-4657
Attorneys for Plaintiff Employers Mutual Casualty
Company

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

STEPHEN D. PHILLABAUM
Phillabaum, Ledlin, Matthews & Sheldon, PLLC
421 W. Riverside, Suite 900
Spokane, WA 99201-0413
Fax: (509) 625-1909
Attorneys for Defendant Rimar Construction, Inc.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)



MICHAEL G. SCHMIDT

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DISTRICT
 2007 SEP 26 P 3:31
 JAMES L. SCOTT
 DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
 COMPANY, an Iowa corporation,)
)
 Plaintiff,)
)
 vs.)
)
 RIMAR CONSTRUCTION, INC., an Idaho)
 corporation; and DAVID and KATHY)
 CONNELLY, husband and wife,)
)
 Defendants.)
)

Case No. CV 2007-0000885

NOTICE OF TRIAL

PLEASE TAKE NOTICE that the above-entitled case is set for:

Five-Day Jury Trial 9:00 a.m. on June 23, 2008, in Bonner County
Judge: Steve Verby
Additional Presiding Judges: Charles W. Hosack, John P. Luster, John T. Mitchell, Fred M. Gibler, Lansing Haynes, George Reinhardt, III, James R. Michaud, John H. Bradbury

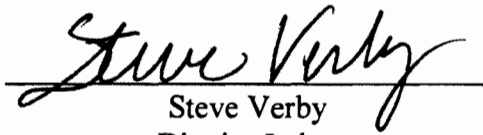
All parties shall comply with the terms of any pretrial order issued herewith; provided however, if this matter was previously set for trial, and a pretrial order issued, then any deadlines therein shall be calculated from the date of the new trial setting.

NOTICE OF TRIAL - 1.

If any party claims a conflict in scheduling and seeks a continuance of this trial, said party shall file such request forthwith. Parties are encouraged to avoid last minute attempts to obtain a continuance.

Any party aggrieved by this order shall notify the court in a timely manner.

DATED this 26 day of September, 2007.


Steve Verby
District Judge


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid or by interoffice mail, this 27 day of September, 2007, to:

James G. Reid
Attorney at Law
PO Box 2773
Boise, ID 83701-2773

Michael G. Schmidt
Lukins & Annis, PS
Suite 102
250 Northwest Blvd.
Coeur d'Alene, ID 83814-2971

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews
& Sheldon, PLLC
421 West Riverside, Suite 900
Spokane, WA 99201


Deputy Clerk

cc: Cherie (District Court)
Bailiff
Chris (Jury Commissioner)
Lynne

NOTICE OF TRIAL - 3.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

PRETRIAL ORDER
(Attachment to Trial Notice)

IT IS HEREBY ORDERED as follows:

1. DISCOVERY All written discovery shall be initiated so that timely responses shall be completed thirty-five (35) days before trial. The last day for taking any discovery depositions shall be twenty-one (21) days before trial.

2. EXPERT WITNESSES Not later than ninety (90) days before trial, Plaintiffs shall disclose all experts to be called at trial. Not later than sixty (60) days before trial, Defendant(s) shall disclose all experts to be called at trial. Such disclosure shall consist of at least the information required to be disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i). Notice of compliance shall be contemporaneously filed with the Court.

3. PRETRIAL MOTIONS Motions for summary judgment shall be timely filed so as to be heard not later than sixty (60) days before trial. Motions in limine concerning designated witnesses and exhibits shall be submitted in writing at least seven (7) days before trial. The last day for hearing all other pretrial motions including other motions in limine shall be twenty-one (21) days before trial.

4. MOTIONS FOR SUMMARY JUDGMENT There shall be served and filed with each motion for summary judgment a separate, concise statement, together with a reference to the record, of each of the material facts as to which the moving party contends there are no genuine issues of dispute.

The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. Any party opposing the motion shall, not later than fourteen (14) days before hearing on the motion for summary judgment and the statement of facts, serve and file a separate, concise statement, together with a reference to the record, setting forth all material facts as to which it is contended there exist genuine issues necessary to be litigated. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy, except and to the extent that such facts are asserted to be actually in good faith controverted by a statement filed in opposition to the motion. If the party filing the motion for summary judgment fails to comply with the twenty eight (28) day time limit set forth in I.R.C.P. 56(c), the court, on its own, will vacate the summary judgment hearing.

5. DISCOVERY DISPUTES Unless otherwise ordered, the Court will not entertain any discovery motion, except those brought by a person appearing pro se and those brought pursuant to I.R.C.P. 26(c) by a person who is not a party, unless counsel for the moving party files with the Court, at the time of filing the motion, a statement showing that the lawyer making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion. The motion shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated.

6. EXHIBITS AND EXHIBIT LISTS Exhibit lists and copies of exhibits shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. The original exhibits should be filed with the Clerk at the time of trial. Each party shall prepare a list of exhibits it expects to offer. Two copies of the exhibit list are to be filed with the Clerk, and a copy is to be provided to opposing parties. Exhibits should be listed in the order that the party anticipates they

PRETRIAL ORDER - 2.

will be offered. Exhibit labels can be obtained from the court clerk. Each party shall affix labels to their exhibits before trial. After the labels are marked and attached to the original exhibit, copies should be made. Plaintiff's exhibits should be marked in numerical sequence. Defendant's exhibits should be marked in alphabetical sequence. The civil action number of the case and the date of the trial should also be placed on each of the exhibit labels. It is expected that each party will have a copy of their exhibits for use at trial.

7. LISTS OF WITNESSES Witness lists shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. Each party shall provide opposing parties with a list of the party's witnesses and shall provide the Court with two copies of each list of witnesses. Witnesses should be listed in the order they are anticipated to be called.

8. JURY INSTRUCTIONS Jury instructions shall be prepared and exchanged between the parties and filed with the Clerk at least seven (7) days before trial. All instructions shall be prepared in accordance with I.R.C.P. 51(a).

9. BRIEFS AND MEMORANDA In addition to any original brief or memorandum filed with the Clerk of the Court, a copy shall be provided to the Court. To the extent counsel rely on legal authorities not contained in the Idaho Reports, a copy of each case or authority cited shall be attached to the Court's copy of the brief or memorandum.

10. TRIAL BRIEFS Trial briefs shall be prepared and exchanged between the parties and filed with the Clerk at least seven (7) days before trial.

11. PROPOSED FINDINGS AND CONCLUSIONS If the trial is to the Court, each party shall, at least seven (7) days prior to trial, file with the opposing parties and the Court proposed Findings of Fact and Conclusions of Law supporting their position.

12. TRIAL SETTINGS Because more than one case is set to begin on the designated trial
PRETRIAL ORDER - 3.

date, upon completion of one trial another trial will begin. Due to this possibility, counsel, clients, and witnesses will need to be available during the entire week the trial is set.

13. MODIFICATION This Pretrial Order may be modified by stipulation of the parties upon entry of an order by the Court approving such stipulation. Any party may, upon motion for good cause shown, seek leave of Court modifying the terms of this order, upon such terms and conditions as the Court deems fit. Any party may request a pretrial conference pursuant to I.R.C.P. 16.

14. SANCTIONS FOR NONCOMPLIANCE Failure to timely comply in all respects with the provisions of this order shall subject noncomplying parties to sanctions pursuant to I.R.C.P. Rule 16(i), which may include:

- a) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence;
- b) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- c) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to comply;
- d) In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing such party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

IT IS FURTHER ORDERED that any vacation or continuation of the trial date shall not
PRETRIAL ORDER - 4.

change or alter any of the discovery or disclosure dates established by the initial trial setting. Any party may, upon motion and for good cause shown, request that the discovery and disclosure dates be altered on vacation or continuance of the trial date.

BY ORDER OF THE COURT

Civil Stock No. Subject

Source

1.	Introduction to Trial Procedure	IDJI 2 - 1 Mod
2.	Jurors Duties	IDJI 100 Mod
3.	Claims of Parties	Specially Prepared
4.	Claims Not Evidence	IDJI 108
5.	Burden of Proof	IDJI 112
6.	Direct & Circumstantial Evidence	IDJI 123
7.	Expert Testimony	IDJI 124
8.	Evaluation of Evidence	IDJI 120 - 121 Mod
9.	Taking Papers in to Jury Room	IDJI 122
10.	Jurors Not to Discuss	IDJI 109
11.	Jurors Admonition	IDJI 110
12.	Court Disclaimer	ICRJI 104 Mod
13.	No Insurance Company is a Party	IDJI 101
14.	Deposition Evidence	IDJI 125

ISSUE INSTRUCTIONS

15.	Damage Instruction: Doesn't Imply Injury	IDJI 900
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- | | | |
|-----|---------------------------------|--------------|
| 16. | Communication With the Court | IDJI 141 |
| 17. | Quotient Verdict | IDJI 143 |
| 18. | How to Use Special Verdict Form | |
| 19. | How to Deliberate | IDJI 140 Mod |
| 20. | Filling Out Verdict | IDJI 144 Mod |

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
COUNTY OF BONNER
CLERK OF DISTRICT COURT
2007 OCT 22 P 12:39
[Signature]

ORIGINAL

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

STIPULATION FOR LEAVE TO AMEND
PETITION FOR DECLARATORY
JUDGMENT

COMES NOW the parties to the above-entitled action, by and through their respective counsel of record, and hereby stipulate and agree as follows:

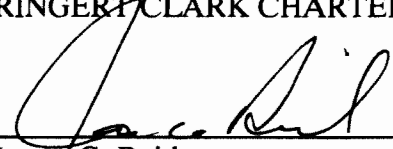
1. Plaintiff, Employers Mutual Casualty Company, may amend its Petition for Declaratory Judgment as set forth on Exhibit "A" attached hereto.

STIPULATION FOR ORDER TO AMEND PETITION FOR DECLARATORY JUDGMENT -

DATED this 19 day of ^{October} ~~September~~, 2007.


RINGERT CLARK CHARTERED

by:


James G. Reid
Attorney for Employers Mutual
Casualty Company


PHILLABAUM, LEDLIN,
MATTHEWS

by:


Stephen D. Phillabaum
Attorney for Rimar Construction,
Inc.

LUKINS & ANNIS

by:


Michael G. Schmidt
Attorney for David and Kathy
Donnelly

STIPULATION FOR ORDER TO AMEND PETITION FOR DECLARATORY JUDGMENT -

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; **Ivan Rimar**, an individual; and
DAVID and **KATHY DONNELLY**,
husband and wife;

Defendants.

Case No. CV-2007- 00885

**AMENDED PETITION FOR
DECLARATORY JUDGMENT**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, and as a complaint and cause of action against Defendants, Rimar Construction, Inc., Ivan Rimar, an individual, and David and Kathy Donnelly, hereby alleges as follows:

PARTIES

1

AMENDED PETITION FOR DECLARATORY JUDGMENT - 1

EXHIBIT A 074

Plaintiff, Employers Mutual Casualty Company (hereinafter “EMC”), is, and at all material times herein was, an Iowa corporation doing business in the State of Idaho. EMC is a licensed insurer in the State of Idaho.

2

Defendant, Rimar Construction, Inc. (hereinafter “Rimar”), is, and at all material times herein was, an Idaho corporation in good standing with its registered office and principal place of business located in Sandpoint, Bonner County, Idaho.

3

Defendant, Ivan Rimar (hereinafter and collectively “Ivan”) is, and at all times mentioned herein was, upon information and belief, a resident of the State of Idaho residing in Bonner County, Idaho.

4

Defendants, David and Kathy Donnelly (hereinafter and collectively “Donnelly”), are, and at all material times herein were, individuals married to one another and residents of Bonner County, Idaho.

JURISDICTION

5

Rimar, Ivan and Donnelly (collectively “Defendants”) are located within the jurisdictional boundaries of this Court, as a result of which this Court has personal jurisdiction over Defendants.

6

This Court has jurisdiction over this Petition pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE §§ 10-1201 *et seq.* Referral of this action to the Magistrate Division of this Court

is not appropriate.

VENUE

7

Defendants are located within the jurisdictional boundaries of this Court, as a result of which venue for this action is appropriate with this Court pursuant to IDAHO CODE § 5-404.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

8

On or about March 17, 2005, Rimar and Donnelly entered into a contract for the construction of certain additions, the renovation and the repair to the home of Donnelly (hereinafter "Construction Project").

9

Donnelly asserts that pursuant to the contract with Rimar for the Construction Project, Rimar was to act as the general contractor.

10

Rimar, and subcontractors and/or independent contractors retained by Rimar, performed construction on the Construction Project pursuant to the agreement between Rimar and Donnelly. Rimar discontinued work on the Construction Project on or about October 18, 2005.

11

Subsequently, Donnelly complained of problems with the Construction Project, including but not limited to: (a) unskillful work in need of repair, removal and/or completion; (b) additions that were not structurally sound or were unsafe for use; (c) installation of substandard materials; (d) improper installation of flooring; (e) breach of express and implied warranties of workmanship; (f)

installation of goods in a manner that voided manufacturer warranties; (g) charging for work caused by Rimar's own errors; (h) untimely completion of construction; (i) failure to building according to applicable building codes; (j) failure to procure necessary building permits; (k) failure to complete construction (l) failure to submit invoices for materials; (m) failure to pay subcontractors; (n) failure to provide a disclosure statement; (o) improper encumbrance of the subject property; (p) violation of the Idaho Consumer Protection Act; and (q) clouding Donnelly's title to the subject property.

12

On or about July 31, 2007, Donnelly filed an Amended Verified Complaint in Bonner County seeking damages against Rimar and Ivan, which is identified as Bonner County, Idaho Case No. CV-06-00445 (hereinafter "the Lawsuit"). The Amended Verified Complaint specifically alleges that Rimar failed to perform the work required on the Construction Project in conformance with the agreement between Rimar and Donnelly and that Rimar failed to perform the work with good quality workmanship and in a skillful manner. The Amended Verified Complaint further alleges that Ivan made misrepresentations and committed professional malpractice.

13

In the Lawsuit, Donnelly makes claims against Rimar for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, and for quiet title/declaratory relief. Donnelly makes claims against Ivan for misrepresentation and professional malpractice.

14

Rimar and Ivan notified EMC of the Lawsuit and EMC agreed to provide a defense to Rimar and Ivan under a reservation of rights.

15

During the relevant time periods, from October 1, 2004 through October 1, 2006, EMC had the following contracts of insurance (hereafter “EMC Policies”) with Rimar, which provided general commercial liability coverage: October 1, 2004 through October 1, 2005, Policy No. 2D1-32-95-05; and October 1, 2005 through October 1, 2006, Policy No. 2D1-32-95-06.

16

An actual controversy has arisen and now exists between EMC and Defendants regarding their respective rights and duties under the EMC Policies.

17

Each of the EMC Policies provides coverage for “property damage or bodily injury caused by an occurrence.” “Property Damage” is defined under the Policies as: “a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.”

18

Damages for construction defects that do not cause additional damage to property, but merely are things that do not conform to the plans and specifications, or are code violations or contract breaches, are not “property damage”, in that there is no physical injury to tangible property or loss of use involved in those types of damages. Accordingly, the EMC Policies do not provide coverage because those types of damages are not “property damage.”

19

During the time construction was ongoing, from March 2005 through October 2005,

Exclusions j(5) -(6) in the EMC Policies excluded coverage for actual “property damage” to the Donnelly home:

j. Damage to Property

...

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

“Your work” is defined as work done by the insured or on its behalf.

20

After operations were completed, Exclusion 1. in the EMC Policies excludes from coverage “property damage” to the Donnelly home caused by the work performed on it, with the exception of subcontractor work.

21

Exclusions a., b., m, and Professional Liability Endorsement (7-98), in the EMC Policies further exclude from coverage “property damage” that is expected or intended from the standpoint of Rimar, “property damage” that Rimar is obligated to pay by reason of the assumption of liability by contract, “property damage” resulting from a “defect, deficiency, inadequacy or dangerous condition” in Rimar’s work, “property damage” resulting from a “delay or failure” by Rimar or Rimar’s subcontractors to perform a contract “in accordance with its terms”, and “property damage” arising from Rimar’s “rendering or failure to render any professional services.”

22

Accordingly, due to exclusions in the EMC Policies, to the extent there is “property damage” to the Donnelly home, as defined by the EMC Policies, that property damage is not covered under the EMC Policies.

23

EMC desires a judicial determination of its rights and duties, and a declaration from the Court stating whether the EMC Policies provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property, and whether the EMC Policies provide coverage for “property damage” to the Donnelly home.

24

A judicial determination is necessary and appropriate at this time under all the circumstances so that EMC may determine its duties under the insurance contract and to determine what portion of any damage award against Rimar or Ivan, if any, is payable by EMC.

25

Actual confusion exists between the parties hereto as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

26

An actual controversy exists between the parties as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

27

By virtue of the foregoing, pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE

§§ 10-1201 et seq., EMC respectfully requests entry of a Judgment declaring that: (a) the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property; and (b) the EMC Policies do not provide coverage for “property damage” to the Donnelly home due to policy exclusions.

COURT COSTS AND ATTORNEY FEES

28

EMC has been required to retain the attorney services of Ringert Clark Chartered in order to prosecute and maintain this action.

29

EMC is entitled to an award of court costs incurred herein, pursuant to IDAHO CODE § 10-1210 and/or Rule 54(d) of the IDAHO RULES OF CIVIL PROCEDURE.

WHEREFORE, EMC PRAYS that the Court enter its decree, judgment, or order providing EMC with the following relief:

- A. Declaring that the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property; and
- B. Declaring that the EMC Policies do not provide coverage for “property damage” to the Donnelly home due to policy exclusions; and
- C. Awarding EMC its court costs incurred relative to this action; and
- D. For such other and further relief as the Court deems just and appropriate under the

circumstances.

DATED this _____ day of September, 2007.

RINGERT CLARK CHARTERED

by: _____
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the _____ day of September, 2007, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971

James G. Reid

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
5 (208) 263-6866
6 (208) 263-0400 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 OCT 24 A 9:53

CLERK DISTRICT COURT
[Signature]

7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC
9 STEPHEN D. PHILLABAUM, ISB NO. 5127
10 421 West Riverside, Suite 900
11 Spokane, Washington, 99201
12 (509) 838-6055
13 (509) 625-1909 (Fax)

14 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
15 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

16 EMPLOYERS MUTUAL CASUALTY
17 COMPANY, an Iowa corporation,

NO. CV-2007-00885

18 Plaintiff,

19 v.

MOTION TO APPEAR AS
COUNSEL PRO HAC VICE AND
DECLARATION OF BRIAN S.
SHELDON IN SUPPORT THEREOF

20 RIMAR CONSTRUCTION, INC., an Idaho
21 corporation; and DAVID and KATHY
22 DONNELLY, husband and wife,

23 Defendants.

24 COMES NOW, Stephen D. Phillabaum, the undersigned local counsel and petitions the
25 Court for admission of BRIAN S. SHELDON, the undersigned applying counsel, pursuant to
26 Idaho Bar Commission Rule 222, for the purpose of the above-captioned matter. Based upon the

27 MOTION TO APPEAR AS COUNSEL PRO HAC VICE
28 AND DECLARATION OF BRIAN S. SHELDON IN
SUPPORT THEREOF - 1

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0412
TELEPHONE (509) 838-6055


1 Declaration of BRIAN S. SHELDON filed herewith, applying counsel, certifies that he is an
2 active member, in good standing, of the bar of the State of Washington, that he maintains the
3 regular practice of law at the above-indicated address, and that he is not a resident of the State of
4 Idaho or licensed to practice in Idaho.
5

6 Both undersigned counsel certify that a copy of this motion has been served on all other
7 parties to this matter and that a copy of the motion, accompanied by a \$200 fee, has been
8 provided to the Idaho State Bar.
9

10 Local counsel requests that applying counsel be allowed to appear at court proceedings
11 and depositions without the presence of local counsel.

12 Local counsel certifies that the above information is true to the best of his knowledge,
13 after reasonable investigation.

14 Dated October 23, 2007.

15
16 
17
18 Stephen D. Phillabaum, ISB #5127
19 Attorneys for Rimar Construction, Inc.

20 
21
22 Brian S. Sheldon

23 Local Counsel

24 Applying Counsel

25
26
27 MOTION TO APPEAR AS COUNSEL PRO HAC VICE
28 AND DECLARATION OF BRIAN S. SHELDON IN
SUPPORT THEREOF - 2

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1
2 DECLARATION OF BRIAN S. SHELDON, ATTORNEY AT LAW

3 BRIAN S. SHELDON, Attorney at Law, subject to penalty of perjury under the laws of
4 the State of Idaho, states:

5 1) I am a member of the law firm of Phillabaum, Ledlin, Matthews & Sheldon,
6 PLLC, 421 West Riverside Avenue, Suite 900, Spokane, Washington 99201; (509)838-6055. I
7 have been retained by Rimar Construction, Inc., to represent them and defend their interests in
8 the above-entitled action.
9

10 2) Pursuant to Rule 222, I respectfully request permission to appear as counsel and
11 participate in this case and to formally associate with Stephen D. Phillabaum of Phillabaum,
12 Ledlin, Matthews & Sheldon, PLLC, 421 W. Riverside Avenue, Spokane, Washington 99201;
13 (509) 838-6055.
14

15 3) I am a member in good standing of the bar of the State of Washington. I have not
16 been disbarred formally censured nor been subject to any disciplinary sanctions by any court of
17 record or by any state bar association, and there are no pending disciplinary proceedings against me.
18

19 4) I have read the Idaho Bar Commission Rules, particularly Rule 222, and familiar
20 therewith.

21 Dated this 23 day of October, 2007.
22

23 
24 BRIAN S. SHELDON, Attorney at Law
25

26
27 MOTION TO APPEAR AS COUNSEL PRO HAC VICE
28 AND DECLARATION OF BRIAN S. SHELDON IN
SUPPORT THEREOF - 3

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 23 day of October, 2007, true and correct copies of the foregoing Motion to Appear as Counsel Pro Hac Vice and Declaration of Brian S. Sheldon, to which this declaration is attached, were served by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax): (208) 342-4657

Michael G. Schmidt
William D. Hyslop
Lukins & Annis, P.S.
250 Northwest Blvd., Suite 250
Coeur d'Alene, Idaho 83814-2971

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax): (208) 664-4125

Idaho State Bar
P.O. Box 895
Boise, Iaho 83701

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax)

DATED October 23, 2007.


LESLIE SWIFT

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MOTION TO APPEAR AS COUNSEL PRO HAC VICE
AND DECLARATION OF BRIAN S. SHELDON IN
SUPPORT THEREOF - 4

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 FAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 FEATHERSTON LAW FIRM, CHTD.
 2 BRENT C. FEATHERSTON, ISB NO. 4602
 3 113 South Second Avenue
 Sandpoint, ID 83864
 (208) 263-6866
 4 (208) 263-0400 (Fax)

5 PHILLABAUM, LEDLIN, MATTHEWS
 6 & SHELDON, PLLC
 7 STEPHEN D. PHILLABAUM, ISB NO. 5127
 421 West Riverside, Suite 900
 8 Spokane, Washington, 99201
 (509) 838-6055
 9 (509) 625-1909 (Fax)

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2007 OCT 24 A 9:53

MARIE SCOTT
 CLERK DISTRICT COURT
[Signature]
 AUTHORITY

Received 10/25/07

11 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 12 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

14 EMPLOYERS MUTUAL CASUALTY
 15 COMPANY, an Iowa corporation,

16 Plaintiff,

17 v.

18 RIMAR CONSTRUCTION, INC., an Idaho
 19 corporation; and DAVID and KATHY
 20 DONNELLY, husband and wife,

21 Defendants.

NO. CV-2007-00885

MOTION TO APPEAR AS
 COUNSEL PRO HAC VICE AND
 DECLARATION OF BRIAN S.
 SHELDON IN SUPPORT THEREOF

23 COMES NOW, Stephen D. Phillabaum, the undersigned local counsel and petitions the
 24 Court for admission of BRIAN S. SHELDON, the undersigned applying counsel, pursuant to
 25 Idaho Bar Commission Rule 222, for the purpose of the above-captioned matter. Based upon the

28 MOTION TO APPEAR AS COUNSEL PRO HAC VICE
 AND DECLARATION OF BRIAN S. SHELDON IN
 SUPPORT THEREOF - 1

PHILLABAUM, LEDLIN, MATTHEWS
 & SHELDON, PLLC
 ATTORNEYS AT LAW
 900 FAULSTEN CENTER
 SPOKANE, WASHINGTON 99201-0418
 TELEPHONE (509) 838-6055

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

BONNER COUNTY COURTHOUSE
215 S. FIRST AVE. P 2: 26
SANDPOINT, ID 83864
CLERK DISTRICT COURT

Date: 10/25/07

FROM CAROL McDONALD
~~Carole McDonald~~

Fax No: 234-~~4445~~ 2164

TO: Jody

Phone: 1

Fax No: 208/265-1447

Phone: 208/265-1432

SUBJECT: Please let me know as soon
as possible when this is
paid. Thank you

Total number of pages being transmitted, less cover sheet: 1

Advise if received: Yes No

HAVE A GREAT DAY!!!

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
5 (208) 263-6866
6 (208) 263-0400 (Fax)

7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC
9 STEPHEN D. PHILLABAUM, ISB NO. 5127
10 421 West Riverside, Suite 900
11 Spokane, Washington, 99201
12 (509) 838-6055
13 (509) 625-1909 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 OCT 31 P 3: 29

MADESSA
CLERK DISTRICT COURT

clm

14 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
15 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

16 EMPLOYERS MUTUAL CASUALTY
17 COMPANY, an Iowa corporation,

18 Plaintiff,

19 v.

20 RIMAR CONSTRUCTION, INC., an Idaho
21 corporation; and DAVID and KATHY
22 DONNELLY, husband and wife,

23 Defendants.

NO. CV-2007-00885

ORDER GRANTING ADMISSION
PRO HAC VICE

24
25
26
27 ORDER GRANTING ADMISSION PRO HAC VICE - 1

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 FAULSTEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 THE COURT HAVING BEEN PRESENTED with a Motion to Appear as Counsel *Pro*
2 *Hac Vice* and having reviewed the Declaration of Brian S. Sheldon, Attorney at Law, in support
3 thereof and good cause being shown:
4

5 IT IS HEREBY ORDERED that Attorney Brian S. Sheldon is granted admission as
6 counsel *pro hac vice*, shall be allowed to provide representation in all proceedings in the above-
7 entitled case and need not be accompanied by local counsel at depositions or hearings in this
8 matter.

9 DATED this 31st day of October, 2007.
10

11 
12 THE HONORABLE STEVE VERBY
13 District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ORDER GRANTING ADMISSION PRO HAC VICE - 2
28

PHILLBAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 834-6055

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of November 2007, I served a true and correct copy of the foregoing on the individuals listed below, by the following method:

James G. Reid	<input checked="" type="checkbox"/>	U.S. Mail
David P. Claiborne	<input type="checkbox"/>	Hand Delivered
Ringert Clark Chartered	<input type="checkbox"/>	Overnight Mail
455 South Third Street	<input type="checkbox"/>	Telecopy (Fax): (208) 342-4657
P.O. Box 2773		
Boise, Idaho 83701-2773		

Michael G. Schmidt	<input checked="" type="checkbox"/>	U.S. Mail
William D. Hyslop	<input type="checkbox"/>	Hand Delivered
Lukins & Annis, P.S.	<input type="checkbox"/>	Overnight Mail
250 Northwest Blvd., Suite 250	<input type="checkbox"/>	Telecopy (Fax): (208) 664-4125
Coeur d'Alene, Idaho 83814-2971		

Brent C. Featherston	<input checked="" type="checkbox"/>	U.S. Mail
Featherston Law Firm, CHTD	<input type="checkbox"/>	Hand Delivered
113 South Second Avenue	<input type="checkbox"/>	Overnight Mail
Sandpoint, ID 83864	<input type="checkbox"/>	Telecopy (Fax): (208) 263-0400

Stephen D. Phillabaum	<input checked="" type="checkbox"/>	U.S. Mail
Brian Sheldon	<input type="checkbox"/>	Hand Delivered
Phillabaum, Ledlin, Matthews	<input type="checkbox"/>	Overnight Mail
& Sheldon, PLLC	<input type="checkbox"/>	Telecopy (Fax): (509)625-1909
421 W. Riverside Avenue		
Spokane, WA 99201		

Idaho State Bar	<input checked="" type="checkbox"/>	U.S. Mail
P.O. Box 895	<input type="checkbox"/>	Hand Delivered
Boise, Iaho 83701	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Telecopy (Fax): 1909

Jody Moreland
Clerk of the Court

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ORDER GRANTING ADMISSION PRO HAC VICE - 3

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
County of Bonner } ss
FILED 10-31-07
AT 3:29 O'CLOCK PM
CLERK, DISTRICT COURT
[Signature]
Deputy

ORIGINAL

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

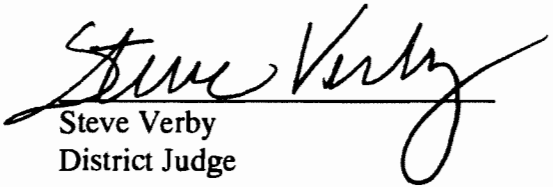
Case No. CV-2007-00885

ORDER FOR LEAVE TO AMEND
PETITION FOR DECLARATORY
JUDGMENT

Based upon the Stipulation of the parties, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiff, Employers Mutual Casualty Company, may amend and file its Amended Petition for Declaratory Judgment as set forth on Exhibit "A" to the Stipulation for Leave to Amend Complaint.

ORDER FOR LEAVE TO AMEND PETITION FOR DECLARATORY JUDGMENT - 1

DATED this 31st day of October, 2007.


Steve Verby
District Judge

ORDER FOR LEAVE TO AMEND PETITION FOR DECLARATORY JUDGMENT - 2

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

NOV 7 2007
2007 NOV -7 P 4: 46
Ulm

5 PHILLABAUM, LEDLIN, MATTHEWS
6 & SHELDON, PLLC
7 STEPHEN D. PHILLABAUM, ISB NO. 5127
8 421 West Riverside, Suite 900
9 Spokane, Washington, 99201
(509) 838-6055
(509) 625-1909 (Fax)

10
11 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
12 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER
13

14 EMPLOYERS MUTUAL CASUALTY
15 COMPANY, an Iowa corporation,

NO. CV-2007-00885

16 Plaintiff,

DEFENDANTS' MOTION FOR
DISMISSAL OF PLAINTIFF'S
AMENDED PETITION FOR
DECLARATORY JUDGMENT

17 v.

18 RIMAR CONSTRUCTION, INC., an Idaho
19 corporation; and DAVID and KATHY
20 DONNELLY, husband and wife,

21 Defendants.

22
23 COME NOW Defendants RIMAR CONSTRUCTION, INC. and IVAN RIMAR, by and
24 through their attorneys, Stephen D. Phillabaum and Phillabaum, Ledlin, Matthews & Sheldon,
25
26

27 DEFENDANTS' MOTION FOR DISMISSAL OF
28 PLAINTIFF'S AMENDED PETITION FOR
DECLARATORY JUDGMENT - 1

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 PLLC, and move to dismiss Plaintiff's Amended Petition for Declaratory Judgment under Rules
2 12(b)(1), 12(b)(6), 12(c) and 56(b).

3 Dated November 7, 2007.

4 PHILLABAUM, LEDLIN, MATTHEWS &
5 SHELDON, PLLC

6
7 By *[Signature]*
8 for Stephen D. Phillabaum,
9 ISB #5127
Attorneys for Rimar Construction, Inc.

10 CERTIFICATE OF SERVICE

11 I declare under penalty of perjury of the laws of the state of Washington that on the
12 7th day of November, 2007, true and correct copies of Defendants' Motion for
13 Dismissal of Plaintiff's Amended Petition for Declaratory Judgment, to which this declaration is
14 attached, were served by the method indicated below, and addressed to the following:

15 James G. Reid
16 David P. Claiborne
17 Ringert Clark Chartered
18 455 South Third Street
19 P.O. Box 2773
20 Boise, Idaho 83701-2773

[] U.S. Mail
[] Hand Delivered
[] Overnight Mail
[] Telecopy (Fax): (208) 342-4657

21 Michael G. Schmidt
22 William D. Hyslop
23 Lukins & Annis, P.S.
24 250 Northwest Blvd., Suite 250
25 Coeur d'Alene, Idaho 83814-2971

[] U.S. Mail
[] Hand Delivered
[] Overnight Mail
[] Telecopy (Fax): (208) 664-4125

26 DATED November 7, 2007.

27 *[Signature]*
28 LESLIE SWIFT

F:\Users\SteveP\docs by client\Rimar\Motion for Dismissal.doc

29 DEFENDANTS' MOTION FOR DISMISSAL OF
30 PLAINTIFF'S AMENDED PETITION FOR
DECLARATORY JUDGMENT - 2

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 FAULSTEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6035

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.
CLERKS CERTIFICATE OF MAILING

2007 NOV -2 P 2: 29

I hereby certify that I mailed to the following individual(s) the Order for Leave to Amend Petition for Declaratory Judgment, on the 2nd day of November, 2007:

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID. 83814-2971

James G. Reid
Ringert Clark Chartered
PO Box 2773
Boise, ID. 83701

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA. 99201


Deputy Clerk

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2007 NOV -7 P 12:05

CLERK OF DISTRICT COURT

efm

ORIGINAL

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; **Ivan Rimar**, an individual; and
DAVID and **KATHY DONNELLY**,
husband and wife;

Defendants.

Case No. CV-2007- 00885

**AMENDED PETITION FOR
DECLARATORY JUDGMENT**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, and as a complaint and cause of action against Defendants, Rimar Construction, Inc., Ivan Rimar, an individual, and David and Kathy Donnelly, hereby alleges as follows:

PARTIES

1

AMENDED PETITION FOR DECLARATORY JUDGMENT - 1

Plaintiff, Employers Mutual Casualty Company (hereinafter “EMC”), is, and at all material times herein was, an Iowa corporation doing business in the State of Idaho. EMC is a licensed insurer in the State of Idaho.

2

Defendant, Rimar Construction, Inc. (hereinafter “Rimar”), is, and at all material times herein was, an Idaho corporation in good standing with its registered office and principal place of business located in Sandpoint, Bonner County, Idaho.

3

Defendant, Ivan Rimar (hereinafter and collectively “Ivan”) is, and at all times mentioned herein was, upon information and belief, a resident of the State of Idaho residing in Bonner County, Idaho.

4

Defendants, David and Kathy Donnelly (hereinafter and collectively “Donnelly”), are, and at all material times herein were, individuals married to one another and residents of Bonner County, Idaho.

JURISDICTION

5

Rimar, Ivan and Donnelly (collectively “Defendants”) are located within the jurisdictional boundaries of this Court, as a result of which this Court has personal jurisdiction over Defendants.

6

This Court has jurisdiction over this Petition pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE §§ 10-1201 *et seq.* Referral of this action to the Magistrate Division of this Court

is not appropriate.

VENUE

7

Defendants are located within the jurisdictional boundaries of this Court, as a result of which venue for this action is appropriate with this Court pursuant to IDAHO CODE § 5-404.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

8

On or about March 17, 2005, Rimar and Donnelly entered into a contract for the construction of certain additions, the renovation and the repair to the home of Donnelly (hereinafter "Construction Project").

9

Donnelly asserts that pursuant to the contract with Rimar for the Construction Project, Rimar was to act as the general contractor.

10

Rimar, and subcontractors and/or independent contractors retained by Rimar, performed construction on the Construction Project pursuant to the agreement between Rimar and Donnelly. Rimar discontinued work on the Construction Project on or about October 18, 2005.

11

Subsequently, Donnelly complained of problems with the Construction Project, including but not limited to: (a) unskillful work in need of repair, removal and/or completion; (b) additions that were not structurally sound or were unsafe for use; (c) installation of substandard materials; (d) improper installation of flooring; (e) breach of express and implied warranties of workmanship; (f)

installation of goods in a manner that voided manufacturer warranties; (g) charging for work caused by Rimar's own errors; (h) untimely completion of construction; (i) failure to building according to applicable building codes; (j) failure to procure necessary building permits; (k) failure to complete construction (l) failure to submit invoices for materials; (m) failure to pay subcontractors; (n) failure to provide a disclosure statement; (o) improper encumbrance of the subject property; (p) violation of the Idaho Consumer Protection Act; and (q) clouding Donnelly's title to the subject property.

12

On or about July 31, 2007, Donnelly filed an Amended Verified Complaint in Bonner County seeking damages against Rimar and Ivan, which is identified as Bonner County, Idaho Case No. CV-06-00445 (hereinafter "the Lawsuit"). The Amended Verified Complaint specifically alleges that Rimar failed to perform the work required on the Construction Project in conformance with the agreement between Rimar and Donnelly and that Rimar failed to perform the work with good quality workmanship and in a skillful manner. The Amended Verified Complaint further alleges that Ivan made misrepresentations and committed professional malpractice.

13

In the Lawsuit, Donnelly makes claims against Rimar for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, and for quiet title/declaratory relief. Donnelly makes claims against Ivan for misrepresentation and professional malpractice.

14

Rimar and Ivan notified EMC of the Lawsuit and EMC agreed to provide a defense to Rimar and Ivan under a reservation of rights.

15

During the relevant time periods, from October 1, 2004 through October 1, 2006, EMC had the following contracts of insurance (hereafter “EMC Policies”) with Rimar, which provided general commercial liability coverage: October 1, 2004 through October 1, 2005, Policy No. 2D1-32-95-05; and October 1, 2005 through October 1, 2006, Policy No. 2D1-32-95-06.

16

An actual controversy has arisen and now exists between EMC and Defendants regarding their respective rights and duties under the EMC Policies.

17

Each of the EMC Policies provides coverage for “property damage or bodily injury caused by an occurrence.” “Property Damage” is defined under the Policies as: “a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.”

18

Damages for construction defects that do not cause additional damage to property, but merely are things that do not conform to the plans and specifications, or are code violations or contract breaches, are not “property damage”, in that there is no physical injury to tangible property or loss of use involved in those types of damages. Accordingly, the EMC Policies do not provide coverage because those types of damages are not “property damage.”

19

During the time construction was ongoing, from March 2005 through October 2005,

Exclusions j(5) -(6) in the EMC Policies excluded coverage for actual “property damage” to the Donnelly home:

j. Damage to Property

...

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

“Your work” is defined as work done by the insured or on its behalf.

20

After operations were completed, Exclusion 1. in the EMC Policies excludes from coverage “property damage” to the Donnelly home caused by the work performed on it, with the exception of subcontractor work.

21

Exclusions a., b., m, and Professional Liability Endorsement (7-98), in the EMC Policies further exclude from coverage “property damage” that is expected or intended from the standpoint of Rimar, “property damage” that Rimar is obligated to pay by reason of the assumption of liability by contract, “property damage” resulting from a “defect, deficiency, inadequacy or dangerous condition” in Rimar’s work, “property damage” resulting from a “delay or failure” by Rimar or Rimar’s subcontractors to perform a contract “in accordance with its terms”, and “property damage” arising from Rimar’s “rendering or failure to render any professional services.”

22

Accordingly, due to exclusions in the EMC Policies, to the extent there is “property damage” to the Donnelly home, as defined by the EMC Policies, that property damage is not covered under the EMC Policies.

23

EMC desires a judicial determination of its rights and duties, and a declaration from the Court stating whether the EMC Policies provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property, and whether the EMC Policies provide coverage for “property damage” to the Donnelly home.

24

A judicial determination is necessary and appropriate at this time under all the circumstances so that EMC may determine its duties under the insurance contract and to determine what portion of any damage award against Rimar or Ivan, if any, is payable by EMC.

25

Actual confusion exists between the parties hereto as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

26

An actual controversy exists between the parties as to whether, and to what extent, any of the damages claimed by Donnelly are covered by the EMC Policies.

27

By virtue of the foregoing, pursuant to the *Uniform Declaratory Judgment Act*, IDAHO CODE

§§ 10-1201 et seq., EMC respectfully requests entry of a Judgment declaring that: (a) the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property; and (b) the EMC Policies do not provide coverage for “property damage” to the Donnelly home due to policy exclusions.

COURT COSTS AND ATTORNEY FEES

28

EMC has been required to retain the attorney services of Ringert Clark Chartered in order to prosecute and maintain this action.

29

EMC is entitled to an award of court costs incurred herein, pursuant to IDAHO CODE § 10-1210 and/or Rule 54(d) of the IDAHO RULES OF CIVIL PROCEDURE.

WHEREFORE, EMC PRAYS that the Court enter its decree, judgment, or order providing EMC with the following relief:

- A. Declaring that the EMC Policies do not provide coverage for damages claimed for breach of contract, breach of warranty, violation of the Idaho Consumer Protection Act, quiet title, misrepresentation and/or professional malpractice which do not result in actual injury to real property; and
- B. Declaring that the EMC Policies do not provide coverage for “property damage” to the Donnelly home due to policy exclusions; and
- C. Awarding EMC its court costs incurred relative to this action; and
- D. For such other and further relief as the Court deems just and appropriate under the

circumstances.

DATED this 5th day of November, 2007.

RINGERT CLARK CHARTERED

by:


James G. Reid

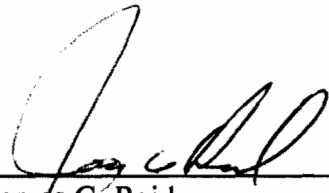
David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the 5th day of November, 2007, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971



James G. Reid

JAMES G. REID, ISB # 1372
 DAVID P. CLAIBORNE, ISB # 6579
 RINGERT CLARK CHARTERED
 455 South Third Street
 P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
 E-mail: dpc@ringertclark.com

2007 NOV 28 A 11:35

[Handwritten signature]

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
 COMPANY, an Iowa corporation;**

Plaintiff,

vs.

**RIMAR CONSTRUCTION, INC., an Idaho
 corporation; and DAVID and KATHY
 DONNELLY, husband and wife; and IVAN
 RIMAR, an individual;**

Defendants.

Case No. CV-2007-00885

**MOTION TO STRIKE AFFIDAVIT OF
 PETER J. JOHNSON AND NOTICE OF
 HEARING**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, and **HEREBY MOVES THE COURT** to **STRIKE** the Affidavit of Peter J. Johnson in Support of Defendant's Motion to Dismiss Plaintiff's Amended Petition.

Good and proper grounds exist for entry of the relief requested hereby for the following

MOTION TO STRIKE AFFIDAVIT OF PETER J. JOHNSON AND NOTICE OF HEARING -
 1


reasons:

- (1) The information presented by the Affidavit is not relevant to Rimar's Motion to Dismiss the Amended Petition in that the Motion presents a pure legal issue that does not require facts outside the pleadings and does not require factual determinations or expert opinion on factual issues; and
- (2) It is not proper for the Court to consider matters outside the pleadings to resolve a motion to dismiss; and
- (3) The Affiant has not been previously or properly disclosed as an expert witness in conformance with discovery propounded upon Rimar earlier in this action and
- (4) There is insufficient foundation to accept any opinion testimony from the Affiant.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Clark Chartered, will call up for hearing the aforesaid motion on the 5th day of December, 2007, at the hour of 11:00 a.m., or as soon thereafter as the parties may be heard, before the Honorable Steve Verby at the Bonner County Courthouse, located at 215 South 1st Avenue in Sandpoint, Idaho.

DATED this 28th day of November, 2007.

RINGERT CLARK CHARTERED

by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 28th day of November, 2007 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: n/a
Attorneys for Rimar Construction

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MICHAEL G. SCHMIDT
LUKINS & ANNIS**
250 Northwest Blvd., Ste. 102
Coeur d'Alene, Idaho 83814-2971
Telephone: (208) 667-0517
Facsimile: (208) 664-4125
E-Mail: n/a
Attorneys for David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne

MICHAEL G. SCHMIDT, ISB# 6911
WILLIAM D. H YSLOP, ISB# 7141
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Fax: (208) 664-4125

NOTED DEC 12 P 3:18
[Handwritten signature]

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY,
COMPANY, an Iowa Corporation,

Plaintiff,

vs.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

ORDER STAYING PLAINTIFF'S
DECLARATORY ACTION

5, S.V.

THIS MATTER came on for hearing on Wednesday, December ~~12~~⁵, 2007 at 11:00 A.M., before the Honorable Steven Verby, on Defendants, David and Kathy Donnelly's, Motion to Stay Proceedings. The Defendant/Counterclaim plaintiff, Rimar Construction, Inc. ("RCI"), appeared by and through its attorneys, Stephen D. Phillabaum of the law firm of Phillabaum, Ledlin, Matthews & Sheldon, PLLC; Employers Mutual Casualty Company ("EMC") appeared by and through its attorneys, James G. Reid and David P. Claiborne of the law firm of Ringert Clark Chartered; and the Donnellys appeared by and through their attorneys, Michael G. Schmidt of the law firm of Lukins & Annis, P.S.. Oral argument was presented at the hearing by the parties' respective counsel.

ORDER STAYING PROCEEDINGS: 1

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This Court, having reviewed the parties' motions, memoranda, evidence, and oral argument, NOW THEREFORE,

IT IS HEREBY ORDERED that the Donnellys' Motion to Stay Proceedings is granted. It is further ordered that the four-day trial scheduled for June 23, 2008 is vacated. This Order Staying Proceedings shall expire upon conclusion of the underlying action, *Donnelly v. Rimar Construction, Inc. et al.*, Bonner County Case No. CV-06-00445.

The Court also heard arguments and comments from the parties' counsel related to Plaintiff EMC's Motion to Dismiss Counterclaim, Motion to Strike Affidavit of Peter J. Johnson, and RCI's Motion to Dismiss. Because this Order stays further proceedings in this matter, these remaining Motions are not being ruled upon at this time.

DATED this 12th day of December, 2007.


STEVEN C. VERBY
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of December, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

MICHAEL G. SCHMIDT
Lukins & Annis, P.S.
250 Northwest Blvd., Ste 102
Coeur d'Alene, ID 83814
Fax: (208) 664-4125
*Attorneys for Defendants David and Kathy
Donnelly*

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

JAMES G. REID
DAVID P. CLAIBORNE
Ringert Clark Chartered
455 S. Third Street
P.O. Box 227
Boise, ID 83701-2773
Fax: (208) 342-4657
*Attorneys for Plaintiff/Counterclaim Defendant
Employers Mutual Casualty Company*

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

STEPHEN D. PHILLABAUM
Phillabaum, Ledlin, Matthews & Sheldon, PLLC
421 W. Riverside, Suite 900
Spokane, WA 99201-0413
Fax: (509) 625-1909
*Attorneys for Defendant/Counterclaim Plaintiff
Rimar Construction, Inc. and Ivan Rimar*

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

MARIE SCOTT

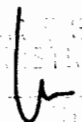
CLERK OF THE DISTRICT COURT

BY: *Jody Meuland*
DEPUTY CLERK

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
COUNTY OF BONNER
DISTRICT COURT

2009 MAR -6 P 2: 18

WALTER SCOTT
DISTRICT COURT


Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; and **DAVID** and
KATHY DONNELLY, husband and wife;

Defendants.

Case No. CV-2007-00885

MOTION TO VACATE ORDER
STAYING PLAINTIFF'S DECLARATORY
ACTION

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and hereby moves the Court to vacate its Order Staying Plaintiff's Declaratory Action, said Order having been entered by the Court on December 12, 2007.

Good cause and proper grounds exist for entry of the relief requested by this Motion for the reason that said Order stayed these proceedings pending the conclusion of the

MOTION TO VACATE ORDER STAYING PLAINTIFF'S DECLARATORY ACTION - 1

underlying action known as *Donnelly v. Rimar Construction, Inc., et al., Bonner County Case No. CV06 00445*. Said underlying action has now been litigated to conclusion, a final judgment has been entered, and the entry of an amended judgment reflecting the Court's Order on post trial motions is imminently expected. With the completion of the underlying action, no just or good reason exists for further delay of disposition of this action.

This Motion is supported by the pleadings, affidavits and other documents on file with the Court in this action, as well as by the pleadings, affidavits and other documents on file with the Court in the referenced underlying action.

Oral argument on this Motion is respectfully requested.

DATED this 6th day of March, 2009.

RINGERT LAW CHARTERED

by:



David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the 6th day of March, 2009, he served the foregoing document by facsimile of a true and correct copy as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201
Fax No. (509) 625-1909

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971
Fax No. (208) 664-4125



David P. Claiborne

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

Attorneys for Plaintiff

STATE OF IDAHO
COUNTY OF BONNER
DISTRICT COURT

2009 MAR 12 A 10:31

MARIE SCOTT
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; and **DAVID** and
KATHY DONNELLY, husband and wife;

Defendants.

Case No. CV-2007-00885

NOTICE OF HEARING

TO: All Interested Parties, and their attorney of record:

YOU WILL PLEASE take notice that Plaintiff will bring on for hearing its MOTION TO VACATE ORDER STAYING PLAINTIFF'S DECLARATORY ACTION before The Honorable Steven C. Verby TELEPHONICALLY, at the hour of 10:30 a.m. on the 8th day of April, 2009, or as soon thereafter as counsel can be heard. The call will be initiated by counsel for Plaintiff through AT&T.

NOTICE OF HEARING - 1

DATED this 9th day of March, 2009.

RINGERT LAW CHARTERED

by:


James G. Reid

NOTICE OF HEARING - 2

CERTIFICATE OF SERVICE

This does hereby certify that on the ¹⁰~~9~~TH day of March, 2009, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971



James G. Reid

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FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB NO. 4602
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
STEPHEN D. PHILLABAUM, ISB NO. 5127
421 West Riverside, Suite 900
Spokane, Washington, 99201
(509) 838-6055
(509) 625-1909 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2009 APR -1 P 4:32

MARIE SCOTT
CLERK DISTRICT COURT
MS
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and DAVID and KATHY
DONNELLY, husband and wife,

Defendants.

NO. CV-2007-00885

DEFENDANT RIMAR
CONSTRUCTION, INC.'S
RESPONSE TO PLAINTIFF'S
MOTION TO VACATE ORDER
STAYING PLAINTIFF'S
DECLARATORY ACTION

PROCEDURAL FACTS

In August 2007, Defendants Donnelly filed a Motion to Stay these proceedings.
September 14, 2007, Defendant Rimar Construction, Inc., joined in the Motion to Stay.

DEFENDANT RIMAR CONSTRUCTION, INC.'S
RESPONSE TO PLAINTIFF'S MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY
ACTION - 1

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 November 7, 2007, Defendants Rimar Construction and Ivan Rimar moved to dismiss the
2 Plaintiff's Petition for Declaratory Judgment. The issues were fully briefed and a hearing was
3 held December 5, 2007 and an Order entered December 12, 2007, staying the proceedings herein
4 until conclusion of the underlying action, Donnelly v. Rimar Construction, Inc., et al., Bonner
5 County Case No. CV-06-00445. Because of the stay, Defendant Rimar Construction, Inc.'s
6 Motion to Dismiss the Complaint was not addressed.
7

8 A trial has been held in the underlying matter. Pending matters are scheduled to be ruled
9 upon and the Plaintiff in this matter, Employers Mutual Casualty Company, has moved to lift the
10 stay in this action.
11

12 ISSUE

13 Is it appropriate to lift the stay in this matter?
14

15 ARGUMENT

16 It is not appropriate to lift the stay in this matter at this time. Stay was entered until
17 conclusion of the underlying action. Although a trial has been held, no final judgment
18 terminating the action has been entered and the time for appeal has not yet run. Until a final
19 order is entered and appeal(s) concluded or the time for appeal ended, the underlying action is
20 not concluded. This matter should not proceed until the issues associated with the underlying
21 matter are finally resolved. Defendants Rimar Construction, Inc. and Ivan Rimar adopt that
22 Memorandum in Support of Defendants' Motion for Dismissal of Plaintiff's Amended Petition
23 filed November 7, 2007, in support of their opposition to vacating the Court's stay; and the
24 Reply Memorandum in Support of Motion to Dismiss Amended Petition filed November 30,
25
26

27 DEFENDANT RIMAR CONSTRUCTION, INC.'S
28 RESPONSE TO PLAINTIFF'S MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY
ACTION - 2

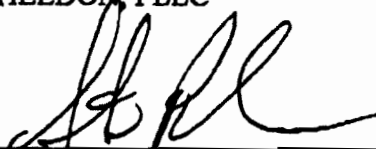
PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 2007. Copies of the Defendants' Memorandums are attached hereto for the convenience of the
2 Court and parties.

3
4 If the Court lifts the stay in this matter, the Court should dismiss the Plaintiff's action for
5 the reasons stated in the above-referenced Memorandum.

6 Dated April 1, 2009.

7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC

9
10 By 
11 Stephen D. Phillabaum, ISB #5127
12 Attorneys for Rimar Construction, Inc.

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27 DEFENDANT RIMAR CONSTRUCTION, INC.'S
28 RESPONSE TO PLAINTIFF'S MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY
ACTION - 3

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

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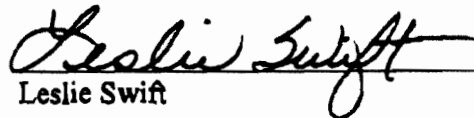
CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 1st day of April, 2009, true and correct copies of the foregoing Defendant Rimar Construction, Inc.'s Response to Plaintiff's Motion to Vacate Order Staying Plaintiff's Declaratory Action, to which this declaration is attached, were served by placing true and correct copies in the United States Mail, postage prepaid and properly addressed to the following; and by transmitting the same via facsimile to the following telecopy numbers:

James G. Reid	<input checked="" type="checkbox"/>	U.S. Mail
David P. Claiborne	<input type="checkbox"/>	Hand Delivered
Ringert Clark Chartered	<input type="checkbox"/>	Overnight Mail
455 South Third Street	<input checked="" type="checkbox"/>	Telecopy (Fax): (208) 342-4657
P.O. Box 2773		
Boise, Idaho 83701-2773		

Michael G. Schmidt	<input checked="" type="checkbox"/>	U.S. Mail
William D. Hyslop	<input type="checkbox"/>	Hand Delivered
Lukins & Annis, P.S.	<input type="checkbox"/>	Overnight Mail
250 Northwest Blvd., Suite 250	<input checked="" type="checkbox"/>	Telecopy (Fax): (208) 664-4125
Coeur d'Alene, Idaho 83814-2971		

DATED April 1, 2009.


Leslie Swift

Response to Motion to Vacate.doc

DEFENDANT RIMAR CONSTRUCTION, INC.'S
RESPONSE TO PLAINTIFF'S MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY
ACTION - 4

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
900 PAULSEN CENTER
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

		<p>IF NO APPEAL, AT THAT POINT, NO LONGER ANY REASON TO DELAY THE DECK ACTION AND CAN GET STARTED WITH THAT</p> <p>IF THERE IS AN APPEAL, ISSUES IN UNDERLYING ACTION STILL RELATED TO DECK ACTION</p> <p>FOR EXAMPLE, PERSONAL LIABILITY OF IVAN RIMAR CONTRACT OR TORT, SUBJECT TO COVERAGE</p> <p>AS ALREADY BRIEFED, THAT SHOULD BE DETERMINED IN UNDERLYING ACTION</p> <p>ID SUPREME COURT SAID COMPANY CAN'T FISH IN WATER UNTIL UNDERLYING</p> <p>ULTIMATELY NOT OPPOSED TO LIFTING OF STAY, IF NO APPEAL, LIFT STAY; IF APPEAL STAY SHOULD NOT BE LIFTED</p> <p>ISSUES THEN LEFT FOR DECK ISSUE</p>
	J	<p>MR SCHMIDT</p> <p>MR HYSLOP</p>
	BH	NO COMMENT
	DC	<p>HYPOTHETICAL WHETHER APPEAL TO BE FILED</p> <p>DETRIMENT OF BOTH PARTIES – EMC AND RIMAR</p> <p>IF APPEAL RESULTED IN DISTURBANCE OF JURY VERDICT</p> <p>RULE 60 WOULD ALWAYS PROVIDE RELIEF</p> <p>PROPER WAY TO DO IT RATHER THAN LET THIS CASE SIT IN LIMBO</p> <p>EVEN IF APPEAL FILED, JUDGMENT CAN BE EXECUTED ON</p> <p>EMC AND RIMAR HAVE CONTRACT</p> <p>IF EXECUTION ON JUDGMENT OUGHT TO KNOW WHO HAS TO PAY</p> <p>JUDGMENT</p> <p>ULTIMATELY WHAT AS ISSUE IN DECK ACTION</p>
	J	<p>RECOGNIZE SOUND DISCRETION OF COURT TO LIFT STAY</p> <p>NUMBER OF CONSIDERATIONS INVOLVED</p> <p>BOTH COUNSEL HAVE ABLY SET FORTH THOSE CONSIDERATIONS AS RELATES TO WHAT SHOULD BE DISCUSSED</p> <p>DOES APPEAR FROM MY POINT OF VIEW THAT WAITING UNTIL APPEAL TIME RUNS NOT UNREASONABLE DELAY</p> <p>DENY MOTION TO LIFT THE STAY</p> <p>AT THIS POINT DON'T KNOW IF GOING TO BE AN APPEAL</p> <p>TAKE INTO CONSIDERATION PARTIES NEED TO KNOW WHO IS GOING TO PAY</p> <p>DECLARATORY JUDGMENT ACTION UNTIMELY?</p> <p>DENY MOTION MR CLAIBORNE, ONLY TO EXTENT AS TO TIMING OF APPEAL</p> <p>IF APPEAL ISN'T FILED THEN CERTAINLY RAISE THE MOTION AGAIN</p> <p>IF AN APPEAL IS FILED, AND THERE ARE ISSUES I MAY CONSIDER THIS A MOTION TO LIFT THE STAY AGAIN ALSO</p> <p>DENIED WITHOUT PREJUDICE</p> <p>LET'S WAIT AND SEE WHAT HAPPENS</p> <p>MAY REFINE ISSUES MORE CLEARLY</p> <p>MR PHILLABAUM PREPARE ORDER FOR MY SIGNATURE</p> <p>THANK YOU</p>
	JR	I DON'T NEED TO REMAIN
	SP	<p>WOULD LIKE TO STAY ON</p> <p>WOULD LIKE TRANSCRIPT</p>
	J	<p>WE'LL LEAVE YOU ON LINE</p> <p>AS TO TRANSCRIPT TALK TO COURT REPORTER DIRECTLY</p>
1049		END

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

MAY 22 10:03 AM '04

MAINE BERRY
CLERK DISTRICT COURT
DEPUTY

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; and **DAVID** and
KATHY DONNELLY, husband and wife;

Defendants.

Case No. CV-2007-00885

**SECOND MOTION TO VACATE ORDER
STAYING PLAINTIFF'S DECLARATORY
ACTION**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and hereby moves the Court to vacate its Order Staying Plaintiff's Declaratory Action, said Order having been entered by the Court on December 12, 2007.

Good cause and proper grounds exist for entry of the relief requested by this Motion for the reason that said Order stayed these proceedings pending the conclusion of the

**SECOND MOTION TO VACATE ORDER STAYING PLAINTIFF'S DECLARATORY
ACTION - 1**

underlying action known as *Donnelly v. Rimar Construction, Inc., et al., Bonner County Case No. CV 06 00445*. Said underlying action has now been litigated to conclusion, a final judgment has been entered, entry of an amended judgment reflecting the Court's Order on post trial motions has been entered, and the time within which Plaintiffs or Defendants could file an appeal on any of the substantive issues involved in the underlying action has now expired. With the completion of the underlying action, no just or good reason exists for further delay of disposition of this action.

This Motion is supported by the pleadings, affidavits and other documents on file with the Court in this action, as well as by the pleadings, affidavits and other documents on file with the Court in the referenced underlying action, as well as by the Memorandum in Support of Second Motion to Vacate Order Staying Plaintiffs' Declaratory Action (filed herewith).

Oral argument, by means of telephonic hearing, is respectfully requested.

DATED this 20th day of May, 2009.

RINGERT LAW CHARTERED

by: 
David P. Claiborne

SECOND MOTION TO VACATE ORDER STAYING PLAINTIFF'S DECLARATORY ACTION - 2

CERTIFICATE OF SERVICE

This does hereby certify that on the 20th day of May, 2009, he served the foregoing document by facsimile of a true and correct copy as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201
Fax No. (509) 625-1909

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971
Fax No. (208) 664-4125



David P. Claiborne

MICHAEL G. SCHMIDT
ISB# 6911
WILLIAM D. HYSLOP
ISB# 7141
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Fax: (208) 664-4125

2009 JUN 29 P 4: 30

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY,
COMPANY, an Iowa Corporation,

Plaintiff,

vs.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

OBJECTION TO EMC'S MOTION TO
LIFT STAY

Defendants David and Kathy Donnelly, hereby object to Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Action as follows:

ARGUMENT

1. **The 54(b) Certificate pertaining to the Donnelly v. Rimar portion of the litigation was only entered on June 25, 2009, meaning the appeal deadline for said parties runs 42 days from that date.**

Under I.A.R. 11, partial judgments are only appealable if they are certified by the trial court to be final as provided by Rule 54(b), I.R.C.P. (See I.A.R. Rule 11(3)). The time for filing appeals allows for the filing of an appeal within 42 days from a judgment that is "appealable as a matter of right in any civil or criminal action." *Id.*

OBJECTION TO EMC'S MOTION TO LIFT STAY

- 1 -

L:\d\doanell025129\00002\p\ldg\Obj. to EMCs motion re stay (final).docx

The Judgment entered in favor of Ivan Rimar on August 14, 2008, was a "partial judgment" under Rule 54(b) because there were multiple claims and multiple parties when it was entered. As such, it could not be appealed without a 54(b) Certificate. Likewise, it was not "appealable as a matter of right" at that time.


Because the time period for appeal only began to run as to the Judgment entered in favor of Ivan Rimar on June 25, 2009 (the date the 54(b) certificate was entered as to the claims between Ivan Rimar and David and Kathy Donnelly), it would be premature to lift the stay in this matter until 42 days from entry of said 54(b) Certificate (concluding on August 6, 2009). Similarly, because the final order denying Ivan Rimar's request for fees was entered June 10, 2009, the lifting of the stay would likewise be premature until at least 42 days from its entry (concluding on July 22, 2009).

CONCLUSION

The Donnellys respectfully request that the stay not be lifted until 42 days from entry of the Rule 54(b) certificate pertaining to the partial judgment between Donnellys and Ivan Rimar (June 25, 2009 plus 42 days = August 6, 2009).

DATED this 29th day of June, 2009.

LUKINS & ANNIS, P.S.

By 
MICHAEL G. SCHMIDT
Attorneys for Defendants David and
Kathy Donnelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

JAMES G. REID
DAVID P. CLAIBORNE
Ringert Clark Chartered
455 S. Third Street
P.O. Box 227
Boise, ID 83701-2773
Fax: (208) 342-4657
Attorneys for Plaintiff Employers Mutual Casualty
Company

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

STEPHEN D. PHILLABAUM
Phillabaum, Ledlin, Matthews & Sheldon, PLLC
421 W. Riverside, Suite 900
Spokane, WA 99201-0413
Fax: (509) 625-1909
Attorneys for Defendant Rimar Construction, Inc.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

BRENT C. FEATHERSTON
FEATHERSTON LAW FIRM, CHTD.
113 South Second Ave.
Sandpoint, ID 83864
Fax: (208) 263-0400

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)



MICHAEL G. SCHMIDT

MICHAEL G. SCHMIDT
ISB# 6911
WILLIAM D. HYSLOP
ISB# 7141
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Fax: (208) 664-4125

2009 JUL -7 A 10:39
lu

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY,
COMPANY, an Iowa Corporation,

Plaintiff,

vs.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

NOTICE OF WITHDRAWAL OF
OBJECTION TO EMC'S MOTION TO
LIFT STAY

Defendants David and Kathy Donnelly hereby withdraw their Objection to Plaintiff's
Motion to Lift Stay.

DATED this 7th day of July, 2009.

LUKINS & ANNIS, P.S.

By *Michael G. Schmidt*
MICHAEL G. SCHMIDT
Attorneys for Defendants David and
Kathy Donnelly

NOTICE OF WITHDRAWAL OF OBJECTION
TO EMC'S MOTION TO LIFT STAY- 1 -

L:\donnell025129\00002\pldg\Withdrawal of Objection to Lifting of Stay.docx

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of July, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

JAMES G. REID
DAVID P. CLAIBORNE
Ringert Clark Chartered
455 S. Third Street
P.O. Box 227
Boise, ID 83701-2773
Fax: (208) 342-4657
Attorneys for Plaintiff Employers Mutual Casualty
Company

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

STEPHEN D. PHILLABAUM
Phillabaum, Ledlin, Matthews & Sheldon, PLLC
421 W. Riverside, Suite 900
Spokane, WA 99201-0413
Fax: (509) 625-1909
Attorneys for Defendant Rimar Construction, Inc.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

BRENT C. FEATHERSTON
FEATHERSTON LAW FIRM, CHTD.
113 South Second Ave.
Sandpoint, ID 83864
Fax: (208) 263-0400

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)



MICHAEL G. SCHMIDT

JAMES G. REID, ISB # 1372
 DAVID P. CLAIBORNE, ISB # 6579
 RINGERT LAW CHARTERED
 455 South Third Street
 P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
 E-mail: dpc@ringertclark.com

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ap

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
 COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
 corporation; **IVAN RIMAR**, an individual;
 and **DAVID** and **KATHY DONNELLY**,
 husband and wife;

Defendants.

Case No. CV-2007-00885

**REPLY MEMORANDUM IN SUPPORT
 OF PLAINTIFF'S SECOND MOTION
 TO VACATE ORDER STAYING
 PLAINTIFF'S DECLARATORY
 ACTION**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and hereby submits this reply memorandum in **SUPPORT** of Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Action.

I. INTRODUCTION.

Plaintiff's are seeking entry of an Order from the Court vacating its Order Staying Plaintiff's

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO VACATE
 ORDER STAYING PLAINTIFF'S DECLARATORY ACTION - 1

Declaratory Action, which was entered by the Court on December 12, 2007. That Order was entered to allow for the conclusion of underlying litigation between the Defendants to this action before allowing this action to proceed on the merits. This Court has full knowledge, and can take judicial notice, of the underlying litigation of the Defendants as this Court handled that action. The instant action concerns insurance coverage for claims made by Defendants Donnelly against Defendants Rimar in the underlying litigation.

It is the position of Plaintiffs that the underlying litigation, at least as to its substantive issues, has been concluded. Defendants Rimar agree with this position, and agree that the stay in this action ought to be vacated. Defendants Donnelly disagree, contend the stay ought to remain, and contend that the underlying litigation remains at issue because the time for appeal has not expired. For the reasons set forth herein, the position of Defendants Rimar is incorrect, the time to appeal the underlying litigation has expired, and the stay ought to be vacated.

II. HISTORY OF THE UNDERLYING LITIGATION.

The underlying litigation is an action known as David and Kathy Donnelly vs. Rimar Construction, Inc. and Ivan Rimar, Case No. CV-06-445 (Bonner County, Idaho). That action was litigated to final judgment through a jury trial. The jury returned a special verdict. As a result thereof, two separate judgments were entered on August 14, 2008 - one disposing of the claims of Donnelly against Ivan Rimar, and the other disposing of the claims of Donnelly against Rimar Construction. As to the former - the claims against Ivan Rimar - the judgment fully disposed of all claims between Donnelly and Ivan Rimar. As to the latter - the claims against Rimar Construction - the judgment did not dispose of all claims. An amended judgment was then entered on March 20, 2009 that disposed

of all claims between Donnelly and Rimar Construction. After March 20, 2009, the only motion practice in the underlying litigation concerned the taxation of court costs and attorney fees - an issue that did not relate to the merits of the underlying action, but rather to procedural post-judgment matters.

III. FINAL JUDGMENT WAS ENTERED IN THE UNDERLYING LITIGATION.

The underlying litigation is now concluded. Clearly, on March 20, 2009 an amended judgment was entered, and as a result thereof any and all claims between the multiple parties to the underlying action were finally resolved. The amended judgment represents a final judgment from which the right to appeal lies without the need for certification. See I.R.C.P. 54(a). In essence, a "judgment" is a final determination of the rights of the parties in an action or proceeding. See State v. McNichols, 62 Idaho 616 (1941). In the underlying action, by March 20, 2009 "judgments" had been entered that finally determined all of the rights of the all of the parties to the action. Consequently, the right to appeal accrued to the parties at that time. See I.R.C.P. 54(a). Where a series of judgments are entered in an action that eventually dispose of all claims, the time for appeal runs from the date of entry of the last in the series of judgments. See M & H Rentals, Inc. v. Sales, 108 Idaho 567, 569 (Ct. App. 1985). A judgment is final and appealable upon entry of the last judgment in the series of judgments. See id. ("[a]lthough the judgment adjudicates less than all claims asserted in the lawsuit, it is, as we have noted, the last in a series and it disposes of all remaining claims, leaving none pending" and whether there is certification under I.R.C.P 54(b) "is of no consequence.")

The Court of Appeals has also explained that a judgment is final, and the right to appeal

accrues, upon entry of a judgment from which a party could seek an award of court costs or attorney fees. Doe I v. Doe II, 128 Idaho 144, 147 (Ct. App. 1996). The fact that motions were brought in the underlying action for the taxation of costs and fees immediately after entry of the August 14, 2008 judgments is indicative of the fact that the parties to the underlying action deemed the judgments as final. The fact that this Court then entertained those motions further bolsters the contention that the judgments represented final determinations from which the right to appeal lied. Moreover, this Court adopted the position that the August 14, 2008 judgments were final when the Court held that filings to obtain an award of costs and fees made by Defendant Ivan Rimar in February 2009 were untimely. See Order Denying Defendant Ivan Rimar's Motion to Reconsider and/or For Enlargement of Time (entered June 10, 2009 in underlying action). To hold affidavits filed in February 2009 to obtain an award of fees and costs were untimely is recognition by this Court that the August 2008 judgments were final, requiring that fees and costs be sought within 14 days, and therefore also requiring that appeal be filed within 42 days.

IV. THE TIME WITHIN WHICH TO APPEAL SUBSTANTIVE ISSUES IN THE UNDERLYING LITIGATION HAS EXPIRED.

The right to appeal any issue related to the merits of the claims involved in the underlying action accrued upon entry of the final judgment. See I.A.R. 11(a)(1). As such, any appeal related to the merits of the claims in the underlying action had to be filed within 42 days of entry of the final judgment. See I.A.R. 14(a). In this action, a final appealable judgment was entered, at the latest, on March 20, 2009. As such, an appeal had to have been filed no later than May 1, 2009. No appeal was filed. The result is that the underlying litigation was concluded as of May 1, 2009, although some post-judgment issues unrelated to the merits of the claims were still pending before the Court. Of

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY ACTION - 4

note, the matters pending before the Court - related to taxation of costs and fees - were not matters of the type that would extend the deadline for filing of an appeal. See id.

Apparently the Court did enter a *Rule 54(b) Certificate* in the underlying action after resolving issues related to the award of fees and costs. The Court's reasoning for doing so is unknown as a final judgment had already been entered in August 2008, or possibly March 2009 at the latest. While the *Rule 54(b) Certificate* may relate to the Court's *Order Denying Defendant Ivan Rimar's Motion to Reconsider and/or for Enlargement of Time* (entered June 10, 2009 in underlying action), it ought not have any relation to the final judgments previously entered. The exact effect of the *Rule 54(b) Certificate* is presently at issue in the underlying action, but it would appear that the issues before the Court in the underlying action still relate to the taxation of fees and costs, and would not in any way disturb the final judgment already entered in March 2009. Because the *Rule 54(b) Certificate*, on its face, appears to be overbroad and mistakenly relate to the August 2008 judgment, one would expect that the Court may exercise its discretion to amend or vacate the *Rule 54(b) Certificate*. See Snake River Equipment Co v. Christensen, 107 Idaho 541, 547 (Ct. App. 1985) (holding that a Rule 54(b) Certificate will be set aside if its entry amounts to an abuse of discretion); Willis v. Larsen, 110 Idaho 818, 822 (Ct. App. 1986) (holding if a district court determines it acted improvidently in issuing a Rule 54(b) Certificate, it has the discretion to vacate the certificate, provided a request for the same is made within 42 days of entry of the Certificate).

Because final judgment was entered on March 20, 2009, and because no appeal was filed within the 42 days thereafter, the underlying action is concluded. The stay of this action is no longer necessary, particularly where the Plaintiffs' insureds, Ivan Rimar and Rimar Construction, Inc., agree

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO VACATE
ORDER STAYING PLAINTIFF'S DECLARATORY ACTION - 5


that the stay ought to be lifted.

V. CONCLUSION.

For the above and foregoing reasons, Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Action ought to be **GRANTED**.

DATED this 7th day of July, 2009.

RINGERT LAW CHARTERED

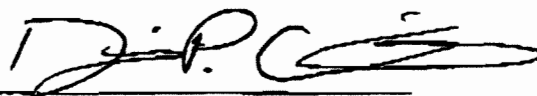
by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the 7th day of July, 2009, he served the foregoing document by facsimile of a true and correct copy as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201
Fax No. (509) 625-1909

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971
Fax No. (208) 664-4125


James G. Reid
David P. Claiborne

JAMES G. REID, ISB # 1372
 DAVID P. CLAIBORNE, ISB # 6579
 RINGERT LAW CHARTERED
 455 South Third Street
 P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
 E-mail: dpc@ringertclark.com

2009 JUL -7 P 2:40

48

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
 COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
 Idaho corporation; **IVAN RIMAR**, an
 individual; and **DAVID** and **KATHY
 DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

NON-OPPOSITION TO VACATING
 STAY AND STIPULATION TO ALLOW
 FILING OF AMENDED ANSWER AND
 COUNTERCLAIM

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and the Defendants Ivan Rimar and Rimar Construction, Inc., by and through their attorneys of record, Phillabaum, Ledlin, Matthews & Sheldon, and hereby provide notice and stipulation as to the following:

1. Defendants Ivan Rimar and Rimar Construction, Inc. hereby stipulate to, and provide notice of non-opposition to, the Plaintiff's Motion for Entry of an Order Vacating the

NON-OPPOSITION TO VACATING STAY AND STIPULATION TO ALLOW FILING OF AMENDED ANSWER AND COUNTERCLAIM - 1

Stay of these proceedings; and

2) Plaintiff and Defendants Ivan Rimar and Rimar Construction, Inc. hereby stipulate and agree to entry of an Order permitting Defendants Ivan Rimar and Rimar Construction, Inc. to file an Amended Answer and Counterclaim herein to respond to Plaintiff's Amended Petition, and to amend allegations made by the said Defendants against Plaintiff in their counterclaim.


DATED this 7th day of July, 2009.

RINGERT LAW CHARTERED

by: 
David P. Claiborne

DATED this ____ day of July, 2009.

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON

by: 
Stephen Phillabaum

NON-OPPOSITION TO VACATING STAY AND STIPULATION TO ALLOW FILING OF
AMENDED ANSWER AND COUNTERCLAIM - 2

Stay of these proceedings; and

2) Plaintiff and Defendants Ivan Rimar and Rimar Construction, Inc. hereby stipulate and agree to entry of an Order permitting Defendants Ivan Rimar and Rimar Construction, Inc. to file an Amended Answer and Counterclaim herein to respond to Plaintiff's Amended Petition, and to amend allegations made by the said Defendants against Plaintiff in their counterclaim.

DATED this _____ day of July, 2009.

RINGERT LAW CHARTERED

by:

David P. Claiborne

DATED this 6 day of July, 2009.

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON

by:

Stephen Phillabaum

NON-OPPOSITION TO VACATING STAY AND STIPULATION TO ALLOW FILING OF
AMENDED ANSWER AND COUNTERCLAIM - 2

CERTIFICATE OF SERVICE

This does hereby certify that on the 7th day of July, 2009, he served the foregoing document by facsimile of a true and correct copy as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971



David P. Claiborne

NON-OPPOSITION TO VACATING STAY AND STIPULATION TO ALLOW FILING OF
AMENDED ANSWER AND COUNTERCLAIM - 3

1 FEATHERSTON LAW FIRM, CHTD.
2 BRENT C. FEATHERSTON, ISB NO. 4602
3 113 South Second Avenue
4 Sandpoint, ID 83864
5 (208) 263-6866
6 (208) 263-0400 (Fax)

201 JUL 10 A 11:36

7 PHILLABAUM, LEDLIN, MATTHEWS
8 & SHELDON, PLLC
9 STEPHEN D. PHILLABAUM, ISB NO. 5127
10 421 West Riverside, Suite 900
11 Spokane, Washington, 99201
12 (509) 838-6055
13 (509) 625-1909 (Fax)

ap

14 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
15 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

16 EMPLOYERS MUTUAL CASUALTY
17 COMPANY, an Iowa corporation,

18 Plaintiff,

19 v.

20 RIMAR CONSTRUCTION, INC., an Idaho
21 corporation; and DAVID and KATHY
22 DONNELLY, husband and wife,

23 Defendants.

NO. CV-2007-00885

RIMAR CONSTRUCTION INC.'S
AMENDED ANSWER TO
PLAINTIFF'S AMENDED PETITION
FOR DECLARATORY JUDGMENT
AND COUNTERCLAIM

Category: I(1)(a)

Fee: \$17.00

24 COMES NOW defendant RIMAR CONSTRUCTION, INC. ("RCI"), by and through its attorney
25 Stephen D. Phillabaum and Phillabaum, Ledlin, Matthews & Sheldon, PLLC, and submits the following
26 Answer to Plaintiff's Amended Petition for Declaratory Judgment.

27 **PARTIES**

28 1

RCI is without sufficient information to admit or deny this allegation, therefore it is denied.

RCI'S AMENDED ANSWER TO
PLAINTIFF'S AMENDED PETITION
FOR DECLARATORY JUDGMENT - I

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

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2

RCI admits paragraph 2 of plaintiff's Amended Petition for Declaratory Judgment.

3

RCI admits paragraph 3 of plaintiff's Amended Petition for Declaratory Judgment.

4

RCI is without sufficient information to admit or deny this allegation, therefore it is denied.

JURISDICTION

5

RCI admits paragraph 5 of plaintiff's Amended Petition for Declaratory Judgment.

6

RCI denies that a justiciable controversy exists between plaintiff and defendant Donnelly and therefore denies.

VENUE

7

RCI admits paragraph 7 of plaintiff's Amended Petition for Declaratory Judgment.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

8

RCI admits that RCI and Donnelly entered into a contract, the terms of which speak for themselves.

9

RCI is without sufficient information to admit or deny this allegation, therefore it is denied.

10

RCI admits performing work for the Donnellys. RCI denies the remainder of paragraph 10.

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11

RCI admits the Donnellys filed a lawsuit against RCI in Bonner County, Case #CV-06-00445, that contained the alleged problems. The Donnellys subsequently filed an amended complaint alleging additional claims, including claims for bodily injury.

12

RCI admits that Donnelly filed a Verified Complaint on March 7, 2006, which alleges multiple claims against RCI that generally include, but are not limited to, claims of faulty workmanship. Donnelly subsequently filed an Amended Verified Complaint making additional alleged claims, including, but not limited to, claims for bodily injury.

13

RCI admits paragraph 13 of plaintiff's Amended Petition for Declaratory Judgment. Donnelly subsequently filed an Amended Verified Complaint making additional alleged claims, including, but not limited to, claims for bodily injury.

14

RCI admits paragraph 14 of plaintiff's Amended Petition for Declaratory Judgment.

15

RCI admits paragraph 15 of plaintiff's Amended Petition for Declaratory Judgment.

16

RCI denies that an actual controversy exists between plaintiff and Donnelly and therefore denies.

17

RCI admits paragraph 17 of plaintiff's Amended Petition for Declaratory Judgment, to the extent it quotes portions of the EMC policy.

18

RCI denies paragraph 18 of plaintiff's Amended Petition for Declaratory Judgment.

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RCI denies paragraph 19 of plaintiff's Amended Petition for Declaratory Judgment.

20

RCI denies paragraph 20 of plaintiff's Amended Petition for Declaratory Judgment.

21

RCI admits paragraph 21 of plaintiff's Amended Petition for Declaratory Judgment, to the extent it quotes portions of the EMC policy.

22

Paragraph 22 of plaintiff's Amended Petition for Declaratory Judgment is a legal conclusion requiring no response from RCI. To the extent a response is required, RCI denies the same.

23

No response to paragraph 23 of plaintiff's Amended Petition for Declaratory Judgment is required. To the extent an answer is required, RCI requests that plaintiff's request for declaration be denied.

24

RCI denies paragraph 24 of plaintiff's Amended Petition for Declaratory Judgment.

25

RCI denies that any confusion exists between plaintiff and Donnelly and therefore denies.

26

RCI denies that an actual controversy exists between plaintiff and Donnelly or RCI and Donnelly with respect to the EMC policy and therefore denies.

27

RCI respectfully requests entry of judgment declaring that the EMC policy does provide coverage for the claimed damages outlined in this paragraph, as well as other damages claimed by Donnelly and costs of defense in the Donnelly action.

1 **COURT COSTS AND ATTORNEY FEES**

2 **28**

3 RCI denies paragraph 28 of plaintiff's Amended Petition for Declaratory Judgment.

4 **29**

5 RCI denies paragraph 29 of plaintiff's Amended Petition for Declaratory Judgment.

6 **AFFIRMATIVE DEFENSES**

7 Defendant RCI makes the following affirmative defenses to plaintiff's Amended Petition for
8 Declaratory Judgment:

- 9 1. EMC has waived its right to seek declaratory relief.
- 10 2. Plaintiff is barred from seeking the requested relief under the doctrine of Equitable
11 Estoppel.
- 12 3. Plaintiff is barred from seeking the requested relief under the doctrine of Laches.
- 13 4. Plaintiff is barred from seeking the relief requested under the doctrine of Unclean Hands.
- 14 5. RCI reserves the right to later amend this answer to state further affirmative defenses.

15 **COUNTERCLAIMS**

16 **STATEMENT OF RELATIVE FACTS**
17 **IN SUPPORT OF COUNTERCLAIMS**

- 18 6. RCI notified EMC of the claims brought by the Donnellys on or about May 16, 2006.
- 19 7. On May 25, 2006, and again on September 5, 2006, EMC notified RCI that it would
20 undertake a defense of the Donnelly claims while reserving its right to investigate whether coverage
21 applied to the claims.
- 22 8. EMC knew at the time it undertook the reservation of rights that some of the claims
23 asserted by the Donnellys were covered under the policy.
- 24 9. EMC agreed to mediate the Donnellys' claims and scheduled the mediation for May 30,
25 2007.

26
27 RCI'S AMENDED ANSWER TO
28 PLAINTIFF'S AMENDED PETITION
FOR DECLARATORY JUDGMENT - 5

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

1 10. Shortly before the mediation, on May 22, 2007, EMC, without RCI's consent, notified
2 the Donnellys by letter that it intended to file a declaratory judgment action against RCI on the issue of
3 coverage. The Donnellys were not insured under the EMC policy, were not beneficiaries of the policy,
4 were not privy to the policy, and had not right to notice under the policy.

5 11. The May 22, 2007, letter from EMC's counsel was the first notice RCI had that its insurer
6 intended to sue RCI in a declaratory judgment action.

7 12. During the mediation, EMC offered minimal contribution towards the proposed
8 settlement and coerced RCI to offer its own funds to resolve the Donnellys' claims.

9 13. EMC knew it would not offer enough to settle the matter at mediation.

10 14. Due to EMC's notice of the declaratory judgment action on the eve of mediation, RCI
11 was unable to secure sufficient funds for the mediation and the mediation was unsuccessful.

12 15. During the mediation, EMC made offers of settlement substantially below the amount
13 it believed would be reasonably necessary to resolve the claims asserted by the Donnellys and coerced
14 RCI to offer its own funds to settle those claims. EMC conducted the settlement negotiations based on
15 its predetermination that it would not afford coverage to RCI.

16 16. EMC's participation in the mediation was detrimental to success of the mediation because
17 it did not engage in good faith negotiations.

18 17. After the mediation, EMC continued to suggest to RCI that it expend its own funds to
19 resolve the claims.

20 18. Donnelly, as a result of receiving EMC's notice regarding the pending declaratory
21 judgment action against RCI, filed an amended complaint personally naming Ivan Rimar as an additional
22 defendant and adding further causes of action and further claims for damages against both RCI and Ivan
23 Rimar.

1 19. The true purpose for Donnelly filing the amended complaint was to ensure coverage under
2 the EMC policy. The effect was to embroil Mr. Rimar personally into the action and expose him and his
3 company to additional damages claims.

4 20. EMC put its own financial interests ahead of RCI's by demanding RCI use its own funds
5 in an attempt to settle the Donnelly action and by notifying the Donnellys of its intent to file the
6 declaratory judgment action, when it knew or should have known that the notification would impair the
7 mediation's potential for success and cause the Donnellys to bring additional claims against RCI and Ivan
8 Rimar personally.

9 21. EMC knew or should have known that Idaho law does not allow an insurer to indefinitely
10 delay commitment to coverage under a reservation of rights.

11 22. EMC's filing of this action more than a year after notice of the Donnelly claim was to
12 improperly coerce RCI into offering its own funds in an attempt to settle the Donnelly litigation.

13 **FIRST CAUSE OF ACTION**

14 **BAD FAITH**

15 Defendants/Counterclaimants reallege paragraphs 1 through 22 of the counterclaim as fully set
16 forth herein.

17 23. EMC acted in bad faith by putting its own financial interests ahead of the interests of its
18 insured when it notified the Donnellys that it would be filing a declaratory judgment action on the eve
19 of mediation, taking control of the defendant's mediation efforts, and failing to bargain in good faith at
20 the mediation.

21 24. EMC acted in bad faith when it coerced RCI into offering its own funds to settle the
22 Donnelly claims in an effort to resolve the claims against EMC.

23 25. EMC acted in bad faith by causing the Donnellys to amend their complaint asserting
24 claims against Ivan Rimar personally and asserting additional causes of action against both RCI
25 Construction and Ivan Rimar in order to ensure insurance coverage.

26
27 RCI'S AMENDED ANSWER TO
28 PLAINTIFF'S AMENDED PETITION
FOR DECLARATORY JUDGMENT - 7

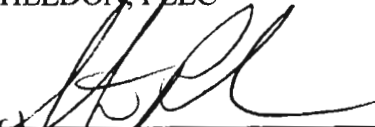
PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

1 3. Awarding defendant/counterclaimant costs and reasonable attorney fees.

2 4. Other relief the Court deems just and equitable.

3 DATED this 9th day of July, 2009.

4 PHILLABAUM, LEDLIN, MATTHEWS
5 & SHELDON, PLLC

6
7 By 
8 Stephen D. Phillabaum, ISB #5127
9 Attorneys for Rimar Construction, Inc.

10 CERTIFICATE OF SERVICE

11 I declare under penalty of perjury of the laws of the state of Washington that on the 9th day of
12 July, 2009, true and correct copies of RIMAR'S AMENDED ANSWER TO AMENDED PETITION
13 FOR DECLARATORY JUDGMENT, COUNTERCLAIM, AND REQUEST FOR JURY TRIAL, to
14 which this declaration is attached, were served by the method indicated below, and addressed to the
15 following:

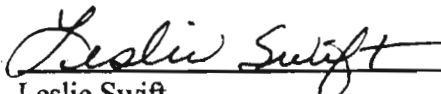
16 James G. Reid
17 David P. Claiborne
18 Ringert Clark Chartered
19 455 South Third Street
20 P.O. Box 2773
21 Boise, Idaho 83701-2773

[] U.S. Mail
[] Hand Delivered
[] Overnight Mail
[] Telecopy (Fax): (208) 342-4657

22 Michael G. Schmidt
23 William D. Hyslop
24 Lukins & Annis, P.S.
25 250 Northwest Blvd., Suite 250
26 Coeur d'Alene, Idaho 83814-2971

[] U.S. Mail
[] Hand Delivered
[] Overnight Mail
[] Telecopy (Fax): (208) 664-4125

27 DATED: July 9, 2009

28 
Leslie Swift

Z:\Users\SteveP\docs by client\Rimar\Answer-Amended.wpd
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RCI'S AMENDED ANSWER TO
PLAINTIFF'S AMENDED PETITION
FOR DECLARATORY JUDGMENT - 9

PHILLABAUM, LEDLIN,
MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
421 WEST RIVERSIDE, SUITE 900
SPOKANE, WASHINGTON 99201-0413
TELEPHONE (509) 838-6055

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

2007 JUL 15 A 10:25

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; **IVAN RIMAR**, an
individual, and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

REPLY TO COUNTERCLAIM

COMES NOW, Employers Mutual Casualty Company, an Iowa corporation, and by way of reply to the Counterclaim on file herein admits, denies and alleges as follows:

I.

The Counterclaim fails to state a cause of action against Counterdefendant upon which relief can be granted.

II.

REPLY TO COUNTERCLAIM - 1

Counterdefendant denies each and every allegation of the Counterclaim not specifically herein admitted. Counterdefendant admits the allegations contained in paragraph 6 and 7 of the Counterclaim.

REQUEST FOR ATTORNEYS FEES

Pursuant to Idaho Code §12-120 and 12-121 and any other applicable statute or agreement, Counterdefendant is entitled to its reasonable attorney's fees incurred in defense of the Counterclaim.

Wherefore, having fully replied to the Counterclaim, Counterdefendant prays as follows:

1. For an Order of the Court dismissing Counterplaintiff's Counterclaim in its entirety;
2. For an Order of the Court awarding Counterdefendant its costs and reasonable attorney's fees incurred;
3. For such other and further relief as to the Court deems just and equitable in the premises.

DATED this 13th day of July, 2009.

RINGERT CLARK CHARTERED

by:

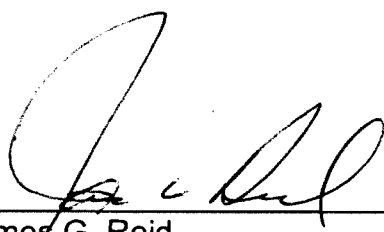

James G. Reid

CERTIFICATE OF SERVICE

This does hereby certify that on the 13th day of July, 2009, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971



James G. Reid

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertclark.com

2009 JUL 17 P 3:12

ap

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an
Idaho corporation; **IVAN RIMAR**,
individually, and **DAVID** and **KATHY
DONNELLY**, husband and wife;

Defendants.

Case No. CV-2007-00885

ORDER VACATING STAY OF
PLAINTIFF'S DECLARATORY ACTION

Upon consideration of Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Action, filed May 22, 2009, the same coming before the Court for hearing on July 9, 2009, and all counsel for the parties appearing before the Court by telephone, and the Court being satisfied that good cause exists for entry of the relief requested by said Motion,

NOW, THEREFORE, it is hereby ordered that the Court's Order Staying Plaintiff's

ORDER VACATING STAY OF PLAINTIFF'S DECLARATORY ACTION - 1

Declaratory Action, entered December 12, 2007, be and is hereby vacated in its entirety.

DATED this 17th day of July, 2009.


Honorable Steven C. Verby

CERTIFICATE OF SERVICE

This does hereby certify that on the 20 day of July, 2009, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

Michael G. Schmidt
William D. Hyslop
Lukins & Annis
250 Northwest Blvd., Suite 102
Coeur d'Alene, ID 83814-2971

James G. Reid
David P. Claiborne
Ringert Law Chartered
P.O. Box 2773
Boise, ID 83701



Deputy Clerk

MICHAEL G. SCHMIDT: ISB# 6911
WILLIAM D. HYSLOP: ISB# 7141
LUKINS & ANNIS, P.S.
250 Northwest Blvd., Ste. 102
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Fax: (208) 664-4125

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2009 JUL 24 P 3:51

MARIE SCOTT
CLERK DISTRICT COURT
MS
DEPUTY

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO.CV-07-00885

MOTION TO WITHDRAW AS
COUNSEL TO DAVID DONNELLY
AND KATHY DONNELLY

NOTICE OF HEARING

AFFIDAVIT

**MOTION TO WITHDRAW AS COUNSEL TO
DAVID DONNELLY AND KATHY DONNELLY.**

Lukins & Annis, P.S., and attorneys Michael G. Schmidt, and William D. Hyslop, as the attorneys of record for David Donnelly and Kathy Donnelly, move this Court pursuant to IRCP Rule 11(b)(2) and (3) for an Order allowing withdrawal as counsel. This Motion is supported by the Affidavit incorporated herein. The grounds for this Motion are that the clients are delinquent in their payments of fees and are directing litigation and demanding that the undersigned counsel take actions without consideration or regard to the undersigned counsel's professional discretion.

MOTION TO WITHDRAW, NOTICE OF HEARING, and AFFIDAVIT:

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- 1 -

pursuant to Order of the Court; that Order of Stay was vacated on July 17, 2009 There is therefore sufficient time for a new attorney to be brought up to speed and represent the Donnellys.

5. The last known address of David and Kathy Donnelly is 3662 Cocolalla Loop Road, P.O. Box 218, Cocolalla, Idaho 83813.

6. Due to these and other professional considerations, I hereby move this Court for an Order permitting LUKINS & ANNIS, P.S., MICHAEL G. SCHMIDT, and WILLIAM D. HYSLOP to withdraw as the attorneys of record for the Defendants David and Kathy Donnelly in accordance with the provisions of I.R.C.P. 11(b)(3).

DATED this 24th day of July, 2009.

William D. Hyslop
WILLIAM D. HYSLOP

SUBSCRIBED AND SWORN to before me this 24th day of July, 2009.



Dargy F. Snow
NOTARY PUBLIC FOR WASHINGTON
RESIDING AT: SPOKANE
COMMISSION EXPIRES: 3/2/12



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of July, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Brent C. Featherston
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864
Fax: (208) 263-0400

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (FAX)

Chris H. Hansen
Anderson Julian & Hull, LLP
250 South Fifth Street, Ste 700
PO Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

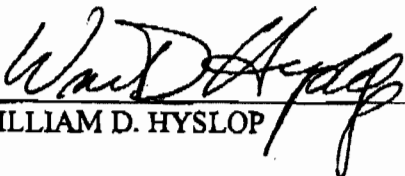
U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (FAX)

David and Kathy Donnelly
3662 Cocolalla Loop Road,
PO Box 218,
Cocolalla, ID 83813
Fax: (208) 265-1714
(Kathy) conexpogrp@earthlink.net
(David) davedonnelly@earthlink.net

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (FAX)
 Email

Michael L. Haman
Haman Law Office PC
923 North 3rd Street
P.O. Box 2155
Coeur d'Alene, ID 83816-2155
Fax: (208) 676-1683

U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (FAX)


WILLIAM D. HYSLOP

S
 MICHAEL G. SCHMIDT: ISB# 6911
 WILLIAM D. HYSLOP: ISB# 7141
 LUKINS & ANNIS, P.S.
 250 Northwest Blvd., Ste. 102
 Coeur d'Alene, ID 83814-2971
 Telephone: (208) 667-0517
 Fax: (208) 664-4125

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
 COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
 Corporation; and DAVID and KATHY
 DONNELLY, husband and wife;

Defendants.

CASE NO.CV-07-00885

ORDER ALLOWING WITHDRAWAL
 OF COUNSEL

Based upon the Motion and Affidavit in Support of Withdrawal of Counsel, the law firm of LUKINS & ANNIS, P.S., MICHAEL G. SCHMIDT, and WILLIAM D. HYSLOP, said firm and attorneys are hereby allowed to withdraw as counsel of record for David Donnelly and Kathy Donnelly. David Donnelly and Kathy Donnelly shall appoint another attorney to appear or shall appear in person by filing a written notice with the Court stating how they will represent themselves within twenty (20) days from the date of service or mailing of this order on David Donnelly and Kathy Donnelly. Failure to do so shall be sufficient grounds for entry of default or default judgment or dismissal of the action with prejudice without further notice.

It is further ordered that the withdrawing attorneys shall serve copies of this Order upon the client and all other parties to the action and shall file proof of service with the court. The

ORDER ALLOWING WITHDRAWAL OF COUNSEL:

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withdrawing attorney may make such service upon the client by personal service or by certified mail to the last known address most likely to give notice to the client which service shall be complete upon mailing.

DATED this ____ day of _____, 2009

The Honorable Steve Verby
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of _____, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Brent C. Featherston
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864
Fax: (208) 263-0400

- U.S. Mail
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William D. Hyslop
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250 Northwest Blvd., Ste. 102
Coeur d'Alene, ID 83814-2971
Fax: (208) 664-4125

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Michael L. Haman
Haman Law Office PC
923 North 3rd Street
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Coeur d'Alene, ID 83816-2155
Fax: (208) 676-1683

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3662 Cocolalla Loop Road,
PO Box 218,
Cocolalla, ID 83813

- U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (FAX)

ORDER ALLOWING WITHDRAWAL OF COUNSEL:

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- 3 -

MARC A. LYONS, ISB# 3145
MICHAEL A. EALY
RAMSDEN & LYONS, LLP
PO Box 1336
Coeur d'Alene, ID 83816-1336
Phone: (208) 664-5818
Fax: (208) 664-8554
ISB No. 5619

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2009 SEP -4 P 3:07

CLERK DISTRICT COURT
[Signature]
DEPUTY

Attorneys for Defendants David and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

CASE NO. CV-07-00885

v.

NOTICE OF WITHDRAWAL AND
SUBSTITUTION OF COUNSEL

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

TO: CLERK OF THE COURT

AND TO: EACH OF THE ABOVE-NAMED PARTIES AND THEIR COUNSEL

NOTICE is hereby given that Michael G. Schmidt, William D. Hyslop, and the law firm of
Lukins & Annis, P.S. withdraws as counsel of record for Defendants and consents to the substitution of
Ramsden & Lyons, LLP as attorneys of record

~~Michael Ramsden~~
MARC LYONS
Michael Ealy, and the law firm of Ramsden & Lyons, LLP, hereby accept
representation of Defendants David and Kathy Donnelly, and give notice of their appearance to all

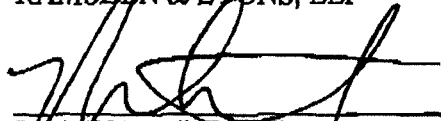
NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL:

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concerned and hereby request that all further pleadings, notices, documents and other papers herein, exclusive of process, be served upon Ramsden & Lyons at the above-stated address.

DATED this 4 day of September, 2009.

RAMSDEN & LYONS, LLP


BY: MICHAEL BALY

DATED this 4 day of September, 2009.

LUKINS & ANNIS, P.S.

By 
MICHAEL G. SCHMIDT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

**BRENT C. FEATHERSTON
FEATHERSTON LAW FIRM
113 South Second Avenue
Sandpoint, Idaho 83864
Telephone: (208) 263-6866
Facsimile: (208) 263-0400
E-Mail: n/a
Attorneys for Rimar Construction**

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: n/a
Attorneys for Rimar Construction**

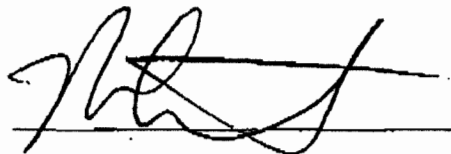
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**JAMES G. REID
RINGERT CLARK CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-Mail: n/a
Attorneys for Employers Mutual Casualty Co.**

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MICHAEL G. SCHMIDT
WILLIAM D. HYSLOP
LUKINS & ANNIS, P.S.
250 Northwest Blvd., Ste 102
Coeur d'Alene, ID 83814
Fax: (208) 664-4125**

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
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- Electronic Mail



JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertlaw.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2009 NOV 12 A 11:42

ap

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and submits this memorandum in **SUPPORT** of Plaintiff's Motion for Summary Judgment, filed herewith.

I. RELEVANT AND MATERIAL FACTS.

The parties to this action include Plaintiff Employers Mutual Casualty Company (herein

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

- 1

“EMC” or “Plaintiff”), Defendant Rimar Construction, Inc. (herein “RCI”), Defendant Ivan Rimar (herein “Ivan”), and Defendants David and Kathy Donnelly (herein “Donnelly”). *Statement of Facts Re: Plaintiff’s Motion for Summary Judgment*, at ¶ 1.

A. The Applicable Insurance Policy.

On September 14, 2004, EMC and RCI entered in to an agreement of insurance known as a Commercial General Liability policy, identified as Policy No. 2D1-32-95-05, whereunder EMC was the insurer and RCI was the insured (herein “the Applicable Policy”). *Id.*, at ¶ 2. The effective dates of coverage under the Applicable Policy began October 1, 2004 and ended October 1, 2005. *Id.*, at ¶ 3. The coverage limits under the Applicable Policy are \$1,000,000 per occurrence. *Id.*, at ¶ 4.

B. The Underlying Litigation.

Relevant to this action is certain underlying litigation between Donnelly, as Plaintiff, and RCI and Ivan, as Defendants, in Case No. CV-06-00445 (Bonner County, Idaho), the proceedings of which were conducted before this Court (herein “the Underlying Litigation”). *Id.*, at ¶ 5. The Underlying Litigation was commenced on March 7, 2006. *Id.*, at ¶ 6. In the Underlying Litigation, Donnelly alleged damages were owed to it from RCI and Ivan based upon remodeling construction work performed on the Donnelly home in 2005. *Id.*, at ¶ 7. The legal theories of liability alleged by Donnelly included breach of contract, misrepresentation, fraud, nondisclosure, professional malpractice, negligence, breach of warranties, violation of the Idaho Consumer Protection Act, quiet title, and for a declaratory judgment. *Id.*, at ¶ 8.

Part of Donnelly’s claim was one allegation that bodily injuries had been suffered by reason of carbon monoxide poisoning from the improper installation of a propane stove. *Id.*, at ¶ 9. Before

trial in the Underlying Litigation, the Court ruled that Donnelly's claim regarding bodily injuries (i.e. the carbon monoxide poisoning) could not be presented to the jury at trial. *Id.*, at ¶ 10.

At trial in the Underlying Litigation, the Court instructed the jury on applicable law, including the following notable instructions -

- That Donnelly's claim that RCI failed to perform in a workmanlike manner is a claim implied by operation of law; and
- That a necessary element of proof of the implied warranty claim included proof of the existence of a contract between RCI and Donnelly.

Id., at ¶ 11. The trial in the Underlying Litigation concluded with entry by the jury of a *Special Verdict* on July 9, 2008. *Id.*, at ¶ 12. Based on the *Special Verdict*, it was determined that RCI breached its contract with Donnelly, including breach of the implied warranty of workmanship, and also violated the Idaho Consumer Protection Act. *Id.*, at ¶ 13. Based on the *Special Verdict*, it was determined that RCI and Ivan did not breach any warranties, did not commit fraud, and did not engage in professional negligence. *Id.*, at ¶ 14. The jury awarded Donnelly the sum of \$126,611.55 for breach of the implied warranty of workmanship and an additional \$2,000.00 for violation of the Idaho Consumer Protection Act. *Id.*, at ¶ 15.

As a result of the foregoing, a judgment was entered on August 14, 2008 requiring RCI to pay the sum of \$128,611.55 to Donnelly for breach of the implied warranty of workmanship (\$126,611.55) and for violation of the Idaho Consumer Protection Act (\$2,000.00). *Id.*, at ¶ 16. Post-verdict, the Court in the Underlying Litigation awarded to Donnelly costs as a matter of right, and attorney fees, and in so holding did so on the basis that -

- \$126,611.55 in damages accounted for compensation to Donnelly for construction

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

- 3

defects on their home, and an additional \$2,000.00 for Consumer Protection Act violations;

- The basic issue litigated in the Underlying Litigation was whether or not the construction was completed in a workmanlike manner;
- Donnelly prevailed by proving RCI failed to substantially perform the work it contracted to perform;
- The contract between Donnelly and RCI constituted a commercial transaction;
- The construction contract was breached by RCI by not completing the work it contracted to perform in accordance with its agreement with Donnelly, or pursuant to sound construction practices in a workmanlike manner; and
- The gravamen of the action involved construction defects.

Id., at ¶ 17. An Amended Judgment was consequently entered on March 20, 2009 awarding Donnelly an additional \$277,062.00 for attorney fees and \$19,871.89 for court costs as a result of a contract-based commercial transaction, for a total recovery by Donnelly of \$425,545.44. *Id.*, at ¶ 18.

C. *The Declaratory Judgment Action.*

In the Underlying Litigation, EMC provided a defense against the suit, throughout its entirety, under reservation of rights, which was reflected in a letter to RCI on September 5, 2006 and in a letter to Ivan on September 7, 2007. *Id.*, at ¶ 19. On May 24, 2007, EMC instituted this action (herein “the Declaratory Judgment Action”). *Id.*, at ¶ 20. EMC seeks a declaratory judgment from the Court holding that under the Applicable Policy EMC has no duty or responsibility to pay all, or any portion, of the damages then claimed by, now awarded to, Donnelly relative to the Underlying

Litigation. *Id.*, at ¶ 21. In this Declaratory Judgment Action, RCI originally made a counterclaim against EMC alleging bad faith, violation of the Consumer Protection Act and breach of contract. *Id.*, at ¶ 22.

On December 12, 2007, the Court entered an order staying the Declaratory Judgment Action until such time as the Underlying Litigation was concluded. *Id.*, at ¶ 23. Once the Underlying Litigation was concluded, this Court lifted its stay of the Declaratory Judgment Action, which was effective on July 17, 2009. *Id.*, at ¶ 24. Thereafter, a Settlement Agreement was entered into between EMC, RCI and Ivan, the terms of which effectuate the following -

- That EMC has no duty, responsibility or legal liability to satisfy the judgments entered in the Underlying Litigation, and has no duty to indemnify RCI from the same;
- That RCI and Ivan agree that their counterclaims alleged in the Declaratory Judgment Action ought to be dismissed with prejudice;
- That RCI and Ivan release and discharge EMC for and from and all liability whatsoever that EMC may have to RCI or Ivan in relation to the Underlying Litigation and the Declaratory Judgment Action;
- That RCI and Ivan do not contest the Declaratory Judgment Action and they further admit all of the allegations made by EMC in the Declaratory Judgment Action.

Id., at ¶ 25.

Now pending before the Court is the question of whether, given the above facts and circumstances, and through application of controlling law, EMC has a duty to pay any portion of the judgment obtained by Donnelly in the Underlying Litigation. *Id.*, at ¶ 26.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

- 5

II. STANDARD OF REVIEW.

Summary judgment is governed by Rule 56, IDAHO RULES OF CIVIL PROCEDURE. The standard of review for a summary judgment motion, as articulated by the Idaho Supreme Court, is as follows -

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . [The] Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact . . . [t]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.

Willie v. Board of Trustees, 138 Idaho 131, 133 (2002) (internal citations omitted).

III. ARGUMENT.

A. *The pertinent provisions of the Applicable Policy.*

The Applicable Policy is attached as Exhibit A to the *Affidavit of James G. Reid*, which is filed herewith. The pertinent **coverage portions** of the Applicable Policy provide as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.¹

...

This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]
- (2) The "bodily injury" or "property damage" occurs during the policy period[.]²

The Applicable Policy defines as **bodily injury** as follows:

¹See Section I.1.a. of the Applicable Policy.

²See Section I.1.b. of the Applicable Policy.

“Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.³

The Applicable Policy defines **property damage** as follows:

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.⁴

The Applicable Policy defines an **occurrence** as follows:

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.⁵

The **Expected or Intended Injury Exclusion** of the Applicable Policy provides as follows:

This insurance does not apply to:

...
“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.⁶

The **Contractual Liability Exclusion** of the Applicable Policy provides as follows:

This insurance does not apply to:

...
“Bodily injury or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

³See Section V.3. of the Applicable Policy.

⁴See Section V.17. of the Applicable Policy.

⁵See Section V.13. of the Applicable Policy.

⁶See Section I.2.a. of the Applicable Policy.

(1) ... That the insured would have in the absence of the contract or agreement[.]⁷

Additionally, the Applicable Policy contains a **Supplementary Payments Provision** which provides as follows:

SUPPLEMENTARY PAYMENTS –COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:
 - a. All expenses we incur.
 - ...
 - e. All costs taxed against the insured in the “suit.”⁸

Relative thereto, the Applicable Policy defines “suit” as “a civil proceeding in which damages because of ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ to which this insurance applies are alleged.”⁹

B. Idaho rules of interpretation relative to insurance policies.

In general, “policies of insurance, as other contracts, are to be construed in their ordinary meaning, and where the language employed is clear and unambiguous, there is no occasion to construe a policy differently than manifested by the plain words therein.” Porter v. Farmers Ins. Co. of Idaho, 102 Idaho 132, 136 (1981). However, the Idaho Supreme Court has clearly explained certain special rules to be applied relative to construction of policies of insurance -

Interpretation of an ambiguous document presents a question of fact. On the other hand, interpretation of an unambiguous document is a question of law. Further, insurance policies are a matter of contract between the insurer and the insured. So, interpretation of an unambiguous insurance contract is a question of law subject to free review. But, where there is an ambiguity in an insurance contract, special rules of construction apply to protect the insured. Under these special rules, insurance

⁷See Section I.2.b. of the Applicable Policy.

⁸See Section I.Supp. Pmt. of the Applicable Policy.

⁹See Section V.18. of the Applicable Policy.

policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved in favor of the insured. Finally, the meaning of the insurance policy and the intent of the parties must be determined from the plain meaning of the insurance policy's own words.

Hall v. Farmers Alliance Mut. Ins. Co., 145 Idaho 313, 318 (2008) (internal citations omitted). The foregoing rules apply to construction of the Applicable Policy provisions.

C. *There is no coverage under the Applicable Policy for the damages awarded due to RCI's breach of the implied warranty of workmanship because of the Contractual Liability Exclusion.*

Donnelly was awarded the sum of \$126,611.55 on account of RCI's breach of the implied warranty of workmanship. The Court instructed the jury to find for Donnelly on that claim only if the jury found that a contract existed between Donnelly and RCI. As such, it is clear that RCI would have no liability to Donnelly for breach of the implied warranty of workmanship in the absence of the existence of a contract between the two. Therefore, the damages awarded on account of said breach are not covered under the policy because of the Contractual Liability Exclusion.

1. The damages awarded relate to contractual liability.

There is no coverage under the Applicable Policy for bodily injury or property damage which the insured is obligated to pay because of liability imposed by contract. The Applicable Policy specifically provides that "[t]his insurance does not apply to . . . 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement."¹⁰ Admittedly, the exclusion does not apply if the insured would have liability "in the absence of the contract or agreement."¹¹

¹⁰See Section I.2.b. of the Applicable Policy.

¹¹See Section I.2.b. of the Applicable Policy.

The Idaho Supreme Court has held that this exclusionary language clearly excludes from coverage any damages awarded against an insured based upon an allegation of breach of contract. See, e.g., Magic Valley Potato Shippers v. Continental Insurance, 112 Idaho 1073 (1987). In that case, the Court was faced with determining whether an insurance policy covered a claim in the face of a contract liability exclusion very similar to that in the Applicable Policy. The Court noted that -

Both the amended complaint and the **district court's instructions to the jury** indicate that the [underlying lawsuit] was an action for breach of contract, and did not involve any claim for damages in tort.

Id., at 1076 (emphasis added). In Magic Valley, the Supreme Court explained that damages were not payable by an insurer due to a contract liability exclusion where the damages sought by and awarded to the claimant were based in contract, not in tort. Id., at 1076-77. Of particular note was the lower court's instructions to the jury. This Court's instructions to the jury in the Underlying Litigation similarly indicate the Underlying Litigation was a contract-based action for which coverage would not apply.

The Contractual Liability Exclusion is clear that the Applicable Policy provides no coverage for bodily injury or property damage the insured becomes obligated to pay by reason of contract law. EMC's insured, RCI, has agreed through the settlement agreement it entered in to with EMC, that the contract liability exclusion applies, and that therefore there is no coverage under the Applicable Policy for the damages awarded based on the implied warranty. As such, the damages awarded to Donnelly by reason of breach of the warranty of workmanship, which was implied by operation of law in to the contract with RCI, are not covered by the Applicable Policy. It is clear that the implied warranty claim was presented to the jury in the Underlying Litigation as a contract claim for which damages could be awarded based upon contract principles. The Court instructed that the implied

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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warranty was part of the contract by operation of law. The Court instructed that a necessary element of the implied warranty claim was the existence of a contract. The Court provided instructions on damages that reflect an understanding that contract damages were to be assessed for breach of the implied warranty.

2. The implied warranty of workmanship claim was a contract claim in the Underlying Litigation.

Donnelly will likely argue that the damages ought to be covered because they were awarded not for breach of contract, but rather for breach of an implied warranty of workmanship. However, such an argument fails since the implied warranty claim was a breach of contract claim in the Underlying Litigation based upon the context in which it was litigated. Idaho case law clearly holds that under the circumstances of the Underlying Litigation, it would be appropriate to apply the implied warranty of workmanship claim as a claim sounding in contract. As a claim sounding in contract, the damages awarded are not covered under the Applicable Policy because of the Contractual Liability Exclusion.

Idaho recognizes a claim for implied warranty of workmanship, which is a blended, or hybrid, cause of action that can sound in both tort and contract, depending upon the nature of relief sought. See Hoffman vs. Simplot Aviation, 97 Idaho 32 (1975). See also Salmon Rivers Sportsmans Camp vs. Cessna Aircraft Company, 97 Idaho 341 (1975) (noting that an implied warranty claim is a freak hybrid born of the illicit intercourse of tort and contract). In Idaho, economic losses cannot be recovered under a tort theory. See Salmon Rivers Sportsmans Camp vs. Cessna Aircraft Company, 97 Idaho 341 (1975); Ramerth vs. Hart, 133 Idaho 194 (1999). Economic losses include the cost of repair and replacement of defective property which is the subject of the

transaction. See Salmon Rivers Sportsmans Camp vs. Cesna Aircraft Company, 97 Idaho 341 (1975); Tusch Enterprises vs. Coffin, 113 Idaho 37 (1987) (damage award to repair improperly constructed foundation and parking lot, and resultant loss of use, are purely economic in nature and can only be obtained in contract); State of Idaho vs. Mitchell Construction Company, 108 Idaho 335 (1984) (cost to repair a defectively constructed roof is a purely economic loss for which recovery can only be found in contract). Recovery of such losses can only be had in contract. See Salmon Rivers Sportsmans Camp vs. Cesna Aircraft Company, 97 Idaho 341 (1975); Clark vs. International Harvester Company, 99 Idaho 326 (1978) (the Court reasoned that economic expectations of parties have not traditionally been protected by the law concerning unintentional torts). In tort law, property damage means damage to property other than the property that is the subject of the transaction. See Salmon Rivers Sportsmans Camp vs. Cesna Aircraft Company, 97 Idaho 341 (1975). **The case law from Idaho's Supreme Court make it clear that an implied warranty of workmanship claim is a contract-based claim where the relief sought or obtained is in contract - meaning it is purely economic in nature, such as repair and replacement of defectively constructed property.** See Salmon Rivers Sportsmans Camp vs. Cesna Aircraft Company, 97 Idaho 341 (1975); Adkinson Corporation vs. American Building Company, 107 Idaho 406 (1984) (holding that breach of implied warranty actions for purely economic losses must be viewed in a contract setting with relevant contract principles); Melichar vs. State Farm Fire and Casualty Company, 143 Idaho 716 (Idaho 2007).

In the Underlying Litigation, RCI was found to be liable for breach of the implied warranty of workmanship and damages in the amount of \$126,611.55 were assessed. It is known from the jury's instruction on damages that the damages assessed were those needed to secure performance

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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of defective work performed by RCI, and to recover property losses suffered by Donnelly on account of RCI's poor quality of construction. In essence, the damages recovered were of a purely economic nature, as that term is explained in Idaho case law, in that the damages relate to the subject of the transaction between Donnelly and RCI. The subject of the transaction in the Donnelly remodeling project was the Donnelly home. All of the damages sought by Donnelly in the Underlying Litigation related to repair and replacement of their damaged home - the subject of the transaction - or for consequential loss of use of the home. Under well established Idaho precedent, all of these damages are purely economic in nature. As such, Donnelly's recovery in the Underlying Litigation was based upon a theory of contractual breach of the implied warranty of workmanship. With the damages sounding in contract in such a way, and with the damage award being inextricably linked to the existence of a contractual relationship that had been breached, the Contractual Liability Exclusion of the Applicable Policy applies and there is no insurance coverage for the assessed damages.

3. The Court's award of attorney fees in the Underlying Litigation reflects an understanding that the implied warranty claim sounded in contract.

As prevailing party in the Underlying Litigation, Donnellys was awarded costs as a matter of right and attorney's fees pursuant to Idaho Code §12-120(3) which, in part, states:

In any civil action to recover on . . . [a] contract relating to the purchase or sale of goods, wares, merchandise or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the Court to be taxed and collected as costs.

In awarding attorney fees to Donnelly in the Underlying Action, the Court recognized that an award was proper because RCI failed to substantially perform the work it contracted to perform, the contract between Donnelly and RCI constituted a commercial transaction, and gravamen of the

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action involved construction defects. This reflects the Court's understanding that contract claims were the gravamen of the Underlying Litigation, as opposed to any tort claims. The Court determined that the implied warranty claim sounded in contract and therefore awarded attorney fees to the prevailing party. This further demonstrates that the implied warranty claim was one in contract for which coverage is not afforded under the Applicable Policy due to the Contractual Liability Exclusion.

D. There is no coverage under the Applicable Policy for damages awarded based upon violation of the Consumer Protection Act because the damages are not property damage.

Donnelly was awarded \$2,000 in damages, representative of statutory penalties for violation by RCI of the Consumer Protection Act. These damages are not covered under the Applicable Policy because they are not property damage. Property damage requires physical injury to tangible property, which can include resulting loss of use of the tangible property, in which event the loss of use is deemed to have occurred at the time of the physical injury that caused the loss of use. Property damage also includes loss of use of tangible property that is not physically injured, in which event the loss of use is deemed to have occurred at the time of the occurrence that caused it. Tangible property is "property that has physical form and characteristics." BLACK'S LAW DICTIONARY, at 1254 (8th ed. 2004). The central question then, as to what constitutes property damage, centers around what constitutes a "physical injury."

A physical injury will not include pure economic loss. Property damage does not include pure economic loss, which is a loss not recoverable under tort law, but recoverable only under contract law. Tusch Enterprises v. Coffin, 113 Idaho 37, 41 (1987). The cost to repair or replace defective property that is the subject of a transaction is pure economic loss, not property damage.

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Id. Further, correlative claims for lost value or loss of profits or use are not property damage, but are pure economic losses. Id. In essence, for property damage to occur there must be some damage to property other than that which is the subject of the transaction. Ramerth v. Hart, 133 Idaho 194, 196 (1999). Where there is no accident, and no physical damage to property, there is no property damage for which recovery can be had under tort law, as opposed to contract law. Clark v. International Harvester Co., 99 Idaho 326, 333 (1978). So, it is clear that a physical injury to property requires that there is an actual physical change or alteration of property, whether it be altered in appearance, shape, odor or some other material dimension. See Traveler's Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 496 (Ill. 2001).

Donnelly was awarded \$2,000 in damages for RCI's violation of the Consumer Protection Act. These damages are a category of damages that are purely statutory in nature and unassociated with the loss of use of property or of physical injury to tangible property. As such, there is no coverage for damages resulting from Rimar's failure to follow the Consumer Protection Act.

E. There is no coverage under the Applicable Policy for damages awarded based upon violation of the Consumer Protection Act because the damages are subject to the Expected or Intended Injury Exclusion.

As an independent, and alternative basis, to the above, even if the consumer protection act damages are considered "property damage," they are still not covered under the Applicable Policy because of the Expected or Intended Injury Exclusion. Simply put, the Expected or Intended Injury Exclusion provides that there is no coverage for any bodily injury or property damage that is expected or intended from the standpoint of the insured. As such, property damage that is expected or intended from the standpoint of the insured's employees is excluded from coverage. The Idaho Supreme Court has held that the language of limitation contained in many policies to the effect that

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damages expected or intended from the standpoint of the insured are not covered is clear, concise and unambiguous. Western Heritage Ins. Co. v. Green, 137 Idaho 832, 837 (2002). As such, this exclusion is applicable to this action, and is not subject to construction in favor of coverage.

To establish violation of the *Idaho Consumer Protection Act*, Donnelly had to establish that RCI engaged in some conduct prohibited by the Act with actual knowledge or under circumstances where the exercise of due care would impose such knowledge. See IDAHO CODE § 48-603. The significant portions of the Act under which Donnelly argued liability against RCI related to those portions that involve deception, falsity, failure to perform promises, misleading conduct and failure to follow statutory requirements (e.g., nondisclosures). All of these are of a nature that RCI would need to have knowledge or intent in their conduct. The Expected or Intended Injury Exclusion absolutely bars coverage for any bodily injury or property damage that is expected or intended from the standpoint of the insured or any of its employees. For Donnelly to prevail on this its claim of violation of the *Idaho Consumer Protection Act*, it had to establish that RCI knowingly violated the provisions of the Act. This means that RCI would reasonably have expected damage to occur if it violated the Consumer Protection Act. Additionally, EMC's insured, RCI, has agreed through the settlement agreement it entered in to with EMC, that the expected or intended injury exclusion applies, and that therefore there is no coverage under the Applicable Policy for the damages awarded based on the consumer protection act. As such, the damages for which RCI is legally obligated to pay to Donnelly on account of violation of the *Idaho Consumer Protection Act* are not covered under the Policy.

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F. *The Applicable Policy does not cover payment of attorney fees awarded against an insured resulting from a judgment against the insured based solely upon claims not covered by the Applicable Policy.*

Donnelly obtained a verdict against RCI only on the claims alleged against the insured for which there is no coverage under the Applicable Policy. As set forth above, the contract claims and Consumer Protection Act claims are not covered under the Applicable Policy, and EMC is not obligated to pay the judgment on those claims under its policy with Rimar.

Attorney fees were then awarded, based entirely upon Donnelly's success on the non-covered claims. Donnelly is now demanding that EMC pay the attorney fees assessed against RCI pursuant to the "Supplemental Payments" provision of the Applicable Policy, despite the fact that the Underlying Litigation which give rise to the fee award are not covered. EMC is not required under the terms of its policy with Rimar to pay such fees.

1. The Supplementary Payments Provision.

Regarding the payment of attorney fees awarded against an insured, the Applicable Policy provides as follows:

SUPPLEMENTARY PAYMENTS –COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

...

e. All costs taxed against the insured in the "suit."

"Suit" is defined in the Applicable Policy as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal advertising injury' *to which this insurance applies* are alleged." (Policy, at 15) (emphasis added). This provision only requires payment of attorney fees awarded against the insured on covered claims, because the language "supplementary payments"

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indicates that payments will only be made in addition to payments on the underlying claim, and because of the limiting language that the supplementary payments only apply in suits where the insurance applies.

Donnelly has made demand based upon an Idaho case from 1989, which held that attorney fees assessed against an insured were to be paid as costs under a homeowner's policy, even when the underlying claims were not covered. See Mutual of Enumclaw v. Harvey, 115 Idaho 1009 (1989). However, the policy language in that case differs substantially from the language in the policy between EMC and RCI, and thus, the holding in that case is not binding on this court. Rather, the better analysis is found in a 2009 case out of California, wherein the court determined that under a policy with language similar to that in the Applicable Policy, attorney fees were not payable under a "Supplemental Payments" provision when the underlying claims were not covered.

2. There is no controlling Idaho precedent.

In Mutual of Enumclaw v. Harvey, the Idaho Supreme Court held that, based upon language in a "Supplementary Coverages" section in a homeowner's policy, which provided that the company would pay "all costs taxed against the insured in any suit defended by the Company", the company was liable to pay attorney fees assessed against its insured even though the underlying claims were not covered under the policy. In reaching its conclusion, the Court specifically noted that "**[t]he results in the cases depend 'upon the language employed by the parties in their contract,'**" and concluded that the "language in the policy of *this case* does not indicate that the payment of costs is conditioned upon a final determination that the policy covers the insured's conduct." *Id.* at 1012 (emphasis added). Thus, even the Mutual of Enumclaw court recognized that its holding was dependent upon the policy language in each case. The holding in Mutual of Enumclaw must be

limited to that case alone and should not be extended to this case because the Applicable Policy differs from the Mutual of Enumclaw policy in significant respects.

In interpreting the policy language in Mutual of Enumclaw, the Court found the language that the company would pay “all costs taxed against the insured in any suit defended by Company” **as well as the placement of the language** “under a heading named ‘Supplementary Coverages’ implies that the provisions therein are separate from and in addition to the basic policy coverage.” Based on the placement of the language, the Court concluded that the obligation to pay such costs was not affected by the fact that the policy did not cover the underlying claim for intentionally tortious conduct.

The Applicable Policy language providing for payment of costs taxed against the insured is not contained in a separate heading entitled “Supplemental Coverage” and, thus, the placement issue significant to the Idaho court is not present in the Applicable Policy. Rather, the language in the Applicable Policy is included under a heading entitled “**Supplemental Payments– Coverages A and B.**” This heading implies that when coverages A or B apply, EMC will make the following supplemental payments. It does not state that it is a supplemental coverage, separate from the underlying coverage. This placement and language are distinguishable from the language and placement in Mutual of Enumclaw.

Additionally, the Applicable Policy contains language limiting the coverage for attorney fees to those “suits” wherein damages “because of ‘bodily injury’, ‘property damage’ or ‘personal advertising injury’ *to which this insurance applies* are alleged.” The policy in Mutual of Enumclaw did not contain such limiting language and can also be distinguished on that fact. Because the language and placement of language differs from the Applicable Policy, and because the Mutual of

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Enumclaw policy did not contain limiting language found in the Applicable Policy, it is not clear that the payment of such costs in the Applicable Policy is “separate from or in addition to the basic policy coverage” as the Court concluded it was in Mutual of Enumclaw. In fact, based upon the placement of the language, and the limiting language found in the definition of “suit,” the holding in Mutual of Enumclaw should not be extended to this case.

3. More Persuasive And Recent Authority Supports a Finding that the EMC Policy Does not Cover Attorney Fees on Non-Covered Claims.

The case arguably most like this case is a 2009 case out of California. In State Farm General Ins. Co. v. Mintarsih, 175 Cal. App. 4th 274, 95 Cal.Rptr. 3d 845 (Calif. App. 2009), the California Court of Appeals held that under a “supplemental payments” provision in its policy, State Farm was not obligated to pay attorney fees taxed against its insured that arose solely out of non-covered claims.

Mintarsih involved an underlying case wherein the plaintiff brought claims for false imprisonment, negligence, fraud and wage and hour violations under the Labor Code. State Farm defended this “mixed” coverage case under a reservation of rights. Plaintiffs prevailed and were awarded attorney fees and costs as the prevailing party on the wage and hour claims. These were not covered claims.

There were two State Farm policies at issue in Mintarsih. The first was a homeowner’s policy that provided State Farm would pay “certain ‘claim expenses’ over and above the limits of liability, including (1) ‘expenses we incur and costs taxed against the Insured in suits we defend’ . . .” State Farm, 175 Cal.App. 4th at 279. The Mintarsih court characterized this provision as a “supplemental payments” provision. *Id.* This language is nearly identical to the language in the

Applicable Policy, which provides coverage in addition to the limits of insurance for “costs taxed against the insured” in “any ‘suit’ against an insured we defend”. Policy, at 7. The second State Farm policy was an umbrella policy which provided coverage: ““When the claim or suit is covered by this policy, but not covered by any other policy available to you: [¶] ... [¶] ... we will pay the expenses we incur and costs taxed against you in suits we defend;’” *Id.* 175 Cal.App. 4th at 280. Again, this policy has language like the Applicable Policy, and hinges on suits in which the company defends the insured.

In analyzing the coverage issue, the Mintarsih court explained that in earlier California cases, the court had “rejected a literal interpretation” of policy language providing coverage for expenses in “any suit against the insured we defend” and had “concluded that the obligation to pay a costs award could arise only if the insurer had a duty to defend the insurer. [The court] stated that just as an insured could not reasonably expect an insurer to pay defense costs in a suit in which there was no potential for coverage, an insured could not reasonably expect an insurer to pay costs awarded against an insured in such a suit.” *Id.* 175 Cal.App. 4th at 285 (emphasis added). **The rationale behind these rulings was that, if every time a company defended under a reservation of rights and was later found not to have a duty to defend the company still had to pay costs taxed to the insured, it would discourage insurers from providing a defense when coverage was in doubt.** Thus, the court had held that if no contractual duty to defend arose, a company would not have to pay costs taxed against an insured, even if the company did defend under a reservation of rights.

Prior to Mintarsih, the California courts had not addressed the issue in the context of a “mixed” case, wherein there was a contractual duty to defend some of the claims but not others.

MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

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Expanding its earlier holdings, the court in Mintarsih held that an insurer does not have a duty to pay costs taxed against an insured in a “mixed” case where the costs could be attributed solely to claims not potentially covered:

An insurer’s implied-in-law duty to defend an entire “mixed” action, including claims that are not even potentially covered, does not give rise to an obligation under a supplemental payments provision to pay costs awarded against the insured that can be attributed solely to claims that were not potentially covered. This is because the duty to defend claims in a “mixed” action that are not potentially covered is not a contractual duty, and the reference in the supplemental payments provision to “suits we defend” encompasses only those claims that the insurer agreed to defend under the terms of the policy. Just as an insured could not reasonably expect to retain the benefit of an insurer’s payment of defense costs that can be allocated solely to claims that were not even potentially covered, an insured could not reasonably expect an insurer to pay costs that can be allocated solely to claims that were not even potentially covered.

Id. 175 Cal.App. at 286. This holding should be applied in this case, wherein EMC has defended a “mixed” case, under a reservation of rights, wherein some claims were covered and others were not, and damages and costs were awarded based solely on the contract claims that were not covered. To hold otherwise would create a chilling effect on insurance carriers’ willingness to defend cases under a reservation of rights.

Based upon the foregoing, it is clear that the only Idaho precedent close to the facts is not controlling because the Supreme Court in that case limited its holding to the policy language in that case, which language differs from that in the Applicable Policy. Thus, the most persuasive authority is the 2009 Mintarsih case out of California, which supports the conclusion that costs and fees awarded against Rimar are not covered by the Applicable Policy.

G. *RCI's counterclaims against EMC ought to be dismissed based upon a settlement and compromise agreement between the two, and based upon a release.*

RCI has advanced counterclaims against EMC alleging breach of contract, violation of the consumer protection act and bad faith. RCI previously agreed that the claim for violation of the consumer protection act was improper and it was therefore withdrawn, leaving the other claims. More recently, RCI, Ivan and EMC entered in to a settlement agreement whereby both RCI and Ivan agreed with EMC that its counterclaims in the Declaratory Judgment Action ought to be dismissed with prejudice. They have stipulated to the entry of such relief. This was done incident to execution of a general release whereby both RCI and Ivan released EMC from any liability associated with the Underlying Litigation and the Declaratory Judgment Action. Based on their settlement agreement, EMC asks the Court to enforce the same by entry of summary judgment on RCI's counterclaims against EMC, which is argument is supported by the theory of compromise, and the theory of release.

IV. CONCLUSION.

The Applicable Policy provides no coverage for any of the damages awarded in the Underlying Litigation. Those damages awarded for RCI's breach of the warranty of workmanship implied by law in the Donnelly contract are not recoverable because the policy excludes contract-based damages from coverage. The damages awarded for RCI's violation of the consumer protection act are not covered because the damages are not property damage, or alternatively and independently, the damages are excluded as being expected or intended by RCI. Finally, the attorney fees and court costs awarded are not covered under the policy because they cannot be supplemental to any other award of damages. EMC's insured, a party in privity with EMC, agrees that none of the damages awarded in the Underlying Litigation are covered by the Applicable Policy. In addition, RCI's

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT


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claims of breach of contract and bad faith are subject to dismissal based upon RCI's settlement agreement with EMC.

For the above and foregoing reasons, *Plaintiff's Motion for Summary Judgment* ought to each be **GRANTED**.

DATED this 9th day of November, 2009.

RINGERT LAW CHARTERED

by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 9th day of November, 2009 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: stevep@spokanelaw.com
Attorneys for Rimar Construction

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MARC A. LYONS
MICHAEL A. EALY
RAMSDEN LYONS**
700 Northwest Blvd.
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
E-Mail: firm@ramsdenlyons.com
Attorneys for David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**HONORABLE STEVE VERBY
DISTRICT JUDGE**
215 South 1st Avenue
Sandpoint, Idaho 83864
Telephone: (208) 265-1445
Facsimile: (208) 263-0896
E-Mail: n/a
Presiding Judge - Courtesy Copy

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertlaw.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

**STATEMENT OF FACTS RE:
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and submits the following statement of facts relative to *Plaintiff's Motion for Summary Judgment*, which is filed herewith:

1. The parties to this action include Plaintiff Employers Mutual Casualty Company (herein "EMC" or "Plaintiff"), Defendant Rimar Construction, Inc. (herein "RCI"), Defendant

STATEMENT OF FACTS RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1

Ivan Rimar (herein “Ivan”), and Defendants David and Kathy Donnelly (herein “Donnelly”).

A. The Applicable Insurance Policy.

2. On September 14, 2004, EMC and RCI entered in to an agreement of insurance known as a Commercial General Liability policy, identified as Policy No. 2D1-32-95-05, whereunder EMC was the insurer and RCI was the insured (herein “the Applicable Policy”). *Affidavit of James G. Reid*, at Ex. A.
3. The effective dates of coverage under the Applicable Policy began October 1, 2004 and ended October 1, 2005. *Affidavit of James G. Reid*, at Ex. A.
4. The coverage limits under the Applicable Policy are \$1,000,000 per occurrence. *Affidavit of James G. Reid*, at Ex. A.

B. The Underlying Litigation.

5. Relevant to this action is certain underlying litigation between Donnelly, as Plaintiff, and RCI and Ivan, as Defendants, in Case No. CV-06-00445 (Bonner County, Idaho), the proceedings of which were conducted before this Court (herein “the Underlying Litigation”).
6. The Underlying Litigation was commenced on March 7, 2006.
7. In the Underlying Litigation, Donnelly alleged damages were owed to it from RCI and Ivan based upon remodeling construction work performed on the Donnelly home in 2005. *Affidavit of James G. Reid*, at Ex. B, at pg. 2.
8. The legal theories of liability alleged by Donnelly included breach of contract, misrepresentation, fraud, nondisclosure, professional malpractice, negligence, breach of

- warranties, violation of the Idaho Consumer Protection Act, quiet title, and for a declaratory judgment. *Affidavit of James G. Reid*, at Ex. B.
9. Part of Donnelly's claim was one allegation that bodily injuries had been suffered by reason of carbon monoxide poisoning from the improper installation of a propane stove. *Affidavit of James G. Reid*, at Ex. B, at pg. 5.
 10. Before trial in the Underlying Litigation, the Court ruled that Donnelly's claim regarding bodily injuries (i.e. the carbon monoxide poisoning) could not be presented to the jury at trial. *Affidavit of James G. Reid*, at Ex. C, at pg. 2-3.
 11. At trial in the Underlying Litigation, the Court instructed the jury on applicable law, including the following notable instructions -
 - a. That Donnelly's claim that RCI failed to perform in a workmanlike manner is a claim implied by operation of law, *Affidavit of James G. Reid*, at Ex. D, at Instr. 48, 49; and
 - b. That a necessary element of proof of the implied warranty claim included proof of the existence of a contract between RCI and Donnelly, *Affidavit of James G. Reid*, at Ex. D, at Instr. 51.
 12. The trial in the Underlying Litigation concluded with entry by the jury of a *Special Verdict* on July 9, 2008. *Affidavit of James G. Reid*, at Ex. E.
 13. Based on the *Special Verdict*, it was determined that RCI breached its contract with Donnelly, including breach of the implied warranty of workmanship, and also violated the Idaho Consumer Protection Act. *Affidavit of James G. Reid*, at Ex. E.
 14. Based on the *Special Verdict*, it was determined that RCI and Ivan did not breach any

warranties, did not commit fraud, and did not engage in professional negligence.

Affidavit of James G. Reid, at Ex. E.

15. The jury awarded Donnelly the sum of \$126,611.55 for breach of the implied warranty of workmanship and an additional \$2,000.00 for violation of the Idaho Consumer Protection Act. *Affidavit of James G. Reid*, at Ex. E.
16. As a result of the foregoing, a judgment was entered on August 14, 2008 requiring RCI to pay the sum of \$128,611.55 to Donnelly for breach of the implied warranty of workmanship (\$126,611.55) and for violation of the Idaho Consumer Protection Act (\$2,000.00). *Affidavit of James G. Reid*, at Ex. F.
17. Post-verdict, the Court in the Underlying Litigation awarded to Donnelly costs as a matter of right, and attorney fees, and in so holding did so on the basis that -
 - a. \$126,611.55 in damages accounted for compensation to Donnelly for construction defects on their home, and an additional \$2,000.00 for Consumer Protection Act violations, *Affidavit of James G. Reid*, at Ex. G, at pg. 2; and
 - b. The basic issue litigated in the Underlying Litigation was whether or not the construction was completed in a workmanlike manner, *Affidavit of James G. Reid*, at Ex. G, at pg. 7; and
 - c. Donnelly prevailed by proving RCI failed to substantially perform the work it contracted to perform, *Affidavit of James G. Reid*, at Ex. G, at pg. 7; and
 - d. The contract between Donnelly and RCI constituted a commercial transaction, *Affidavit of James G. Reid*, at Ex. G, at pg. 8; and
 - e. The construction contract was breached by RCI by not completing the work it

contracted to perform in accordance with its agreement with Donnelly, or pursuant to sound construction practices in a workmanlike manner, *Affidavit of James G. Reid*, at Ex. G, at pg. 9-10; and

f. The gravamen of the action involved construction defects, *Affidavit of James G. Reid*, at Ex. G, at pg. 10.

18. An Amended Judgment was consequently entered on March 20, 2009 awarding Donnelly an additional \$277,062.00 for attorney fees and \$19,871.89 for court costs, for a total recover by Donnelly of \$425,545.44. *Affidavit of James G. Reid*, at Ex. H.

C. *The Declaratory Judgment Action.*

19. In the Underlying Litigation, EMC provided a defense against the suit, throughout its entirety, under reservation of rights, which was reflected in a letter to RCI on September 5, 2006 and in a letter to Ivan on September 7, 2007. *Affidavit of James G. Reid*, at Ex. I.

20. On May 24, 2007, EMC instituted this action (herein "the Declaratory Judgment Action"). *Petition for Declaratory Judgment* (May 24, 2007).

21. EMC seeks a declaratory judgment from the Court holding that under the Applicable Policy EMC has no duty or responsibility to pay all, or any portion, of the damages then claimed by, now awarded to, Donnelly relative to the Underlying Litigation. *Amended Petition for Declaratory Judgment* (Nov. 7, 2007).

22. In this Declaratory Judgment Action, RCI originally made a counterclaim against EMC alleging bad faith, violation of the Consumer Protection Act and breach of contract. *Rimar Construction, Inc.'s Answer to Plaintiff's Petition for Declaratory Judgment, Counterclaim, and Request for Jury Trial* (Aug. 1, 2007).

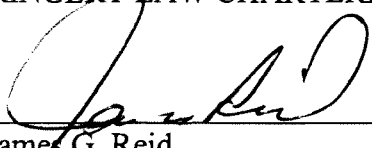
23. On December 12, 2007, the Court entered an order staying the Declaratory Judgment Action until such time as the Underlying Litigation was concluded. *Order Staying Plaintiff's Declaratory Action* (Dec. 12, 2007).
24. Once the Underlying Litigation was concluded, this Court lifted its stay of the Declaratory Judgment Action, which was effective on July 17, 2009. *Order Vacating Stay of Plaintiff's Declaratory Action* (July 17, 2009).
25. Thereafter, a Settlement Agreement was entered into between EMC, RCI and Ivan, *Affidavit of James G. Reid*, at Ex. J, the terms of which effectuate the following -
 - a. That EMC has no duty, responsibility or legal liability to satisfy the judgments entered in the Underlying Litigation, and has no duty to indemnify RCI from the same, *Affidavit of James G. Reid*, at Ex. J, at pg. 2; and
 - b. That RCI and Ivan agree that their counterclaims alleged in the Declaratory Judgment Action ought to be dismissed with prejudice, *Affidavit of James G. Reid*, at Ex. J, at pg. 3; and
 - c. That RCI and Ivan release and discharge EMC for and from and all liability whatsoever that EMC may have to RCI or Ivan in relation to the Underlying Litigation and the Declaratory Judgment Action, *Affidavit of James G. Reid*, at Ex. J, at pg. 3; and
 - d. That RCI and Ivan do not contest the Declaratory Judgment Action and they further admit all of the allegations made by EMC in the Declaratory Judgment Action, *Affidavit of James G. Reid*, at Ex. J, at pg. 3-4.
26. Now pending before the Court is the question of whether, given the above facts and

circumstances, and through application of controlling law, EMC has a duty to pay all of, or any portion of, the judgment obtained by Donnelly in the Underlying Litigation.

DATED this 9 day of November, 2009.

RINGERT LAW CHARTERED

by:



James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 9 day of November, 2009 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: stevep@spokanelaw.com
Attorneys for Rimar Construction

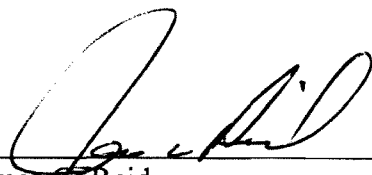
- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MARC A. LYONS
MICHAEL A. EALY
RAMSDEN LYONS**
700 Northwest Blvd.
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
E-Mail: firm@ramsdentlyons.com
Attorneys for David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**HONORABLE STEVE VERBY
DISTRICT JUDGE**
215 South 1st Avenue
Sandpoint, Idaho 83864
Telephone: (208) 265-1445
Facsimile: (208) 263-0896
E-Mail: n/a
Presiding Judge - Courtesy Copy

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne